THIS BOOK CONTAINS THE OFFICIAL

REPORTS OF CASES

DECIDED BETWEEN

OCTOBER 9, 2007 and AUGUST 25, 2008

IN THE

Nebraska Court of Appeals

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PEGGY POLACEK

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By Peggy Polacek, Reporter of the Supreme Court
and the Court of Appeals

For the benefit of the State of Nebraska

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†No. A-06-1099: **BCB Petroleum v. Kurtenbach**. Affirmed in part, and in part reversed and remanded with directions. Carlson, Sievers, and Moore, Judges.

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†No. A-07-246: **State v. Clark**. Affirmed. Cassel, Judge, and Inbody, Chief Judge, and Irwin, Judge.

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†No. A-07-475: **Avery v. Western Coop**. Affirmed. Moore, Sievers, and Carlson, Judges.

No. A-07-486: **Villarreal v. Hansen**. Affirmed. Cassel, Irwin, and Sievers, Judges.

No. A-07-491: **State v. Fitzgerald**. Affirmed. Inbody, Chief Judge, and Sievers and Carlson, Judges.

No. A-07-495: **Wilson v. Wilson**. Affirmed. Carlson, Judge, and Inbody, Chief Judge, and Irwin, Judge.

No. A-07-497: **State v. Walsh**. Affirmed. Cassel, Judge, and Inbody, Chief Judge, and Carlson, Judge.

No. A-07-503: **State v. Harbour**. Affirmed. Irwin, Sievers, and Moore, Judges.

†No. A-07-505: **State v. Statham**. Affirmed. Moore, Sievers, and Carlson, Judges.

†No. A-07-521: **Stehlik v. Stehlik**. Affirmed. Cassel, Judge, and Inbody, Chief Judge, and Irwin, Judge.

No. A-07-541: **State v. Peeks**. Conviction and sentence vacated, and cause remanded with directions. Inbody, Chief Judge, and Carlson and Cassel, Judges.

No. A-07-543: **Nelson v. Brown**. Affirmed. Cassel, Judge, and Inbody, Chief Judge, and Irwin, Judge.

†No. A-07-548: **Watkins v. Jesse**. Affirmed as modified. Cassel, Sievers, and Moore, Judges.

No. A-07-549: **In re Interest of Morraghan J**. Affirmed. Sievers, Carlson, and Cassel, Judges.

†No. A-07-559: **Keiser v. Keiser**. Affirmed as modified. Sievers, Moore, and Cassel, Judges.

No. A-07-568: **Sauer v. Sauer**. Affirmed as modified. Moore, Sievers, and Cassel, Judges.

No. A-07-576: **King v. King**. Affirmed. Sievers, Carlson, and Moore, Judges.

†No. A-07-603: **Kernick v. Kernick**. Affirmed. Moore, Sievers, and Cassel, Judges.

†No. A-07-606: **State on behalf of Bivans v. Bivans**. Affirmed. Sievers, Moore, and Cassel, Judges.

†No. A-07-610: **State v. Beck**. Appeal dismissed. Irwin, Sievers, and Cassel, Judges.

No. A-07-613: **James v. Moore**. Affirmed. Inbody, Chief Judge, and Irwin and Carlson, Judges.

No. A-07-615: **Rayburn v. Rayburn**. Affirmed. Cassel, Judge, and Inbody, Chief Judge, and Irwin, Judge.

†No. A-07-622: **Putnam v. Putnam**. Affirmed. Moore, Sievers, and Carlson, Judges.

No. A-07-623: **In re Interest of Skye W. et al**. Affirmed. Irwin, Judge, and Inbody, Chief Judge, and Moore, Judge.

No. A-07-624: **State v. Sinner**. Affirmed. Cassel, Judge, and Inbody, Chief Judge, and Carlson, Judge.

No. A-07-628: **Doeschot v. Doeschot**. Affirmed. Cassel, Judge, and Inbody, Chief Judge, and Irwin, Judge.

No. A-07-634: **State v. Ormesher**. Affirmed. Carlson, Judge, and Inbody, Chief Judge, and Cassel, Judge.

No. A-07-641: **In re Interest of April M**. Affirmed. Cassel, Judge, and Inbody, Chief Judge, and Carlson, Judge.

No. A-07-642: **In re Interest of Elizabeth W**. Affirmed. Inbody, Chief Judge, and Carlson and Cassel, Judges.

No. A-07-652: **Mays v. Mays**. Affirmed. Irwin, Judge, and Inbody, Chief Judge, and Carlson, Judge.

†No. A-07-655: **State v. Parsons**. Affirmed. Sievers, Moore, and Cassel, Judges.

†No. A-07-656: **Norby v. Farnam Bank**. Reversed and remanded with directions. Sievers, Carlson, and Cassel, Judges.

†No. A-07-659: **State v. Ashcraft**. Affirmed. Irwin, Judge, and Inbody, Chief Judge, and Carlson, Judge.

No. A-07-663: **In re Interest of Lavontae R. et al**. Affirmed. Inbody, Chief Judge, and Carlson and Cassel, Judges.

†No. A-07-669: **Jirsa v. Jirsa**. Affirmed. Cassel, Irwin, and Moore, Judges.

†No. A-07-680: **Grange v. Grange**. Affirmed. Irwin, Judge, and Inbody, Chief Judge, and Carlson, Judge.

No. A-07-686: **Kohl v. Kohl**. Affirmed. Inbody, Chief Judge, and Sievers and Carlson, Judges.

No. A-07-697: **State v. Wakefield**. Affirmed. Sievers, Moore, and Cassel, Judges.

No. A-07-698: **State v. Glenn**. Affirmed. Sievers, Moore, and Cassel, Judges.

†No. A-07-702: **In re Adoption of Christopher R**. Affirmed. Sievers, Carlson, and Moore, Judges.

No. A-07-705: **Blimling v. Rose**. Affirmed in part, affirmed in part as modified, and in part vacated and set aside. Sievers, Carlson, and Moore, Judges.

†No. A-07-715: **State v. Truesdale**. Affirmed. Sievers, Carlson, and Moore, Judges.

†No. A-07-719: **In re Interest of Brittany M. et al**. Affirmed. Irwin, Judge, and Inbody, Chief Judge, and Carlson, Judge.

Nos. A-07-721, A-07-825: **Wiekhorst v. Wiekhorst**. Affirmed in part, and in part reversed. Carlson, Judge, and Inbody, Chief Judge, and Sievers, Judge.

†No. A-07-724: **State v. Hall**. Affirmed. Carlson, Judge, and Inbody, Chief Judge, and Irwin, Judge.

No. A-07-729: **Garza v. Garza**. Affirmed. Inbody, Chief Judge, and Irwin and Carlson, Judges.

No. A-07-738: **Holmes v. Farmers & Ranchers Co-op**. Appeal dismissed. Irwin, Sievers, and Moore, Judges.

No. A-07-743: **State v. Sledge**. Affirmed. Sievers, Carlson, and Moore, Judges.

†No. A-07-745: **Bruno v. Sunglass Hut Trading Corp**. Reversed and remanded for further proceedings. Cassel, Sievers, and Moore, Judges.

No. A-07-747: **Huck v. Sarpy Cty. Bd. of Equal**. Affirmed. Irwin, Judge, and Inbody, Chief Judge, and Cassel, Judge.

†No. A-07-752: **Ginter v. Ginter**. Affirmed. Inbody, Chief Judge, and Irwin and Cassel, Judges.

†No. A-07-767: **Kearns v. Kearns**. Affirmed as modified. Sievers, Moore, and Cassel, Judges.

†No. A-07-771: **State v. McConkey**. Affirmed. Moore, Sievers, and Carlson, Judges.

No. A-07-784: **In re Interest of Curtis H. et al**. Affirmed. Moore, Irwin, and Sievers, Judges.

†No. A-07-786: **State v. Roark**. Affirmed. Irwin, Judge, and Inbody, Chief Judge, and Sievers, Judge.

No. A-07-788: **Julius v. Julius**. Affirmed. Moore, Sievers, and Carlson, Judges.

No. A-07-804: **Eastwood v. Mulder**. Affirmed. Cassel, Judge, and Inbody, Chief Judge, and Carlson, Judge.

No. A-07-806: **State v. Grove**. Affirmed. Sievers, Irwin, and Moore, Judges.

No. A-07-809: **State v. Patterson**. Affirmed. Moore, Irwin, and Cassel, Judges.

No. A-07-814: **In re Interest of Xavier H**. Affirmed. Inbody, Chief Judge, and Carlson and Cassel, Judges.

†No. A-07-820: **Whittamore v. Howell**. Affirmed. Sievers, Judge, and Inbody, Chief Judge, and Cassel, Judge.

†No. A-07-830: **Duda v. American Fam. Ins. Group**. Affirmed. Sievers, Moore, and Cassel, Judges.

No. A-07-842: **Schultes v. Diecker**. Affirmed. Sievers, Moore, and Cassel, Judges.

No. A-07-845: **Pallas v. Pallas**. Affirmed. Carlson, Sievers, and Moore, Judges.

†No. A-07-846: **State v. Davis**. Affirmed. Cassel, Sievers, and Moore, Judges.

†No. A-07-849: **State v. Holmes**. Reversed and remanded for further proceedings. Moore, Judge (1-judge).

No. A-07-850: **State v. Ajamu**. Affirmed. Inbody, Chief Judge, and Carlson, Judge. Sievers, Judge, participating on briefs.

†No. A-07-853: **Noordam v. Noordam**. Affirmed. Cassel, Irwin, and Moore, Judges.

No. A-07-857: **Fraternal Order of Eagles v. Marvin**. Affirmed. Sievers, Moore, and Cassel, Judges.

No. A-07-859: **Alvarez v. Carpetland**. Affirmed. Inbody, Chief Judge, and Irwin and Cassel, Judges.

No. A-07-871: **In re Interest of Daniel V. & Julia V**. Affirmed. Carlson, Sievers, and Moore, Judges.

†No. A-07-878: **In re Interest of Justyce J**. Affirmed. Irwin, Judge, and Inbody, Chief Judge, and Cassel, Judge.

No. A-07-882: **Faltin v. Nelson**. Reversed and remanded for further proceedings. Carlson, Judge, and Inbody, Chief Judge, and Sievers, Judge.

†No. A-07-887: **State ex rel. Linder v. Remmen**. Affirmed in part, and in part reversed and remanded for further proceedings. Irwin, Moore, and Cassel, Judges.

No. A-07-890: **In re Interest of Dakota S. et al**. Affirmed. Moore, Sievers, and Cassel, Judges.

No. A-07-894: **In re Interest of Hunter A**. Affirmed. Cassel, Judge, and Inbody, Chief Judge, and Irwin, Judge.

No. A-07-903: **Regency Homes Assn. v. Schrier**. Affirmed. Inbody, Chief Judge, and Sievers and Carlson, Judges.

No. A-07-907: **In re Interest of Raven M**. Affirmed. Cassel, Judge, and Inbody, Chief Judge, and Carlson, Judge.

†No. A-07-909: **In re Estate of Wegelin**. Affirmed. Sievers, Judge, and Inbody, Chief Judge, and Carlson, Judge.

†No. A-07-921: **Braun v. State ex rel. Bruning**. Affirmed. Sievers, Carlson, and Moore, Judges.

†No. A-07-922: **Knicely v. Knicely**. Affirmed as modified. Cassel, Sievers, and Moore, Judges.

No. A-07-925: **Scott v. Drivers Mgmt., Inc**. Affirmed. Inbody, Chief Judge, and Irwin and Cassel, Judges.

No. A-07-926: **State v. Cantando**. Affirmed. Moore, Sievers, and Cassel, Judges.

No. A-07-927: **Connell v. Connell**. Affirmed. Carlson, Judge, and Inbody, Chief Judge, and Irwin, Judge.

†No. A-07-928: **State v. Pitzer**. Affirmed. Moore, Sievers, and Cassel, Judges.

†No. A-07-932: **Howard Sales Co. v. Bradley**. Reversed and remanded with directions. Irwin, Moore, and Cassel, Judges.

†No. A-07-935: **Tara Hills Villas v. Columbia Ins. Group**. Affirmed. Cassel, Irwin, and Moore, Judges.

No. A-07-949: **State v. Long**. Affirmed. Sievers, Carlson, and Moore, Judges.

†No. A-07-959: **Union Plaza Apts. v. Douglas Cty. Bd. of Equal**. Affirmed. Carlson, Judge, and Inbody, Chief Judge, and Irwin, Judge.

No. A-07-964: **Marvel Precision v. Marvel**. Reversed and remanded for further proceedings. Moore, Irwin, and Cassel, Judges.

No. A-07-983: **In re Interest of BritanyAnn B. et al**. Affirmed. Moore, Sievers, and Carlson, Judges.

†No. A-07-991: **Incontro v. Jacobs**. Reversed. Cassel, Sievers, and Moore, Judges.

†No. A-07-1001: **Fulmer v. H & S Enterprises**. Affirmed. Irwin, Judge, and Inbody, Chief Judge, and Carlson, Judge.

No. A-07-1009: **Garcia v. Midwest Environmental**. Affirmed. Inbody, Chief Judge, and Irwin and Carlson, Judges.

†No. A-07-1010: **State v. Mazza**. Affirmed in part, and in part reversed and remanded with directions. Moore, Irwin, and Cassel, Judges.

No. A-07-1017: **Bodfield v. Wal-Mart**. Affirmed. Sievers, Moore, and Cassel, Judges.

†No. A-07-1027: **Uhler v. Jessen**. Reversed and remanded for further proceedings. Sievers and Cassel, Judges. Carlson, Judge, participating on briefs.

†No. A-07-1047: **Mangers v. Zimmerman**. Affirmed. Sievers, Judge, and Inbody, Chief Judge, and Carlson, Judge.

No. A-07-1058: **In re Interest of Justin S**. Affirmed. Inbody, Chief Judge, and Irwin and Carlson, Judges.

No. A-07-1065: **State v. Cave**. Affirmed. Inbody, Chief Judge, and Irwin and Carlson, Judges.

No. A-07-1081: **In re Interest of Amanda F. et al**. Affirmed as modified. Inbody, Chief Judge, and Irwin and Cassel, Judges.

No. A-07-1090: **Villarreal v. Murphy Movers, Inc**. Affirmed. Moore, Irwin, and Cassel, Judges.

No. A-07-1091: **Wageman v. Wageman**. Affirmed. Cassel, Judge, and Inbody, Chief Judge, and Irwin, Judge.

No. A-07-1093: **In re Interest of Wade W**. Affirmed. Sievers, Moore, and Cassel, Judges.

No. A-07-1096: **Snowden v. Helget Gas Products**. Affirmed. Inbody, Chief Judge, and Irwin and Carlson, Judges.

†No. A-07-1099: **Higgins v. BryanLGH Med. Ctr. East**. Affirmed. Moore, Sievers, and Cassel, Judges. Sievers, Judge, dissents.

No. A-07-1100: **State v. Axtell**. Affirmed. Sievers, Moore, and Cassel, Judges.

†No. A-07-1102: **Budke v. Budke**. Affirmed as modified. Sievers and Cassel, Judges. Inbody, Chief Judge, participating on briefs.

No. A-07-1104: **In re Name Change of McDonald**. Affirmed. Inbody, Chief Judge, and Irwin and Cassel, Judges.

No. A-07-1106: **In re Interest of Bryan M. & Kyrie D**. Affirmed. Carlson, Judge, and Inbody, Chief Judge, and Irwin, Judge.

No. A-07-1109: **State v. Hubbard**. Reversed and remanded for a new trial. Carlson, Judge, and Inbody, Chief Judge, and Irwin, Judge.

No. A-07-1114: **State v. Hill**. Affirmed. Carlson, Judge, and Inbody, Chief Judge, and Irwin, Judge.

No. A-07-1115: **In re Interest of Sissy D**. Affirmed. Moore, Sievers, and Carlson, Judges.

No. A-07-1116: **In re Interest of Brittani N. & Treyton N**. Affirmed. Inbody, Chief Judge, and Irwin and Carlson, Judges.

†No. A-07-1119: **Myles v. McEvoy Trucking**. Affirmed. Carlson, Judge, and Inbody, Chief Judge, and Irwin, Judge.

No. A-07-1125: **In re Interest of Nevaeh A**. Affirmed. Carlson, Judge, and Inbody, Chief Judge, and Irwin, Judge.

No. A-07-1126: **In re Interest of Tony M**. Affirmed. Irwin, Judge, and Inbody, Chief Judge, and Cassel, Judge.

†No. A-07-1142: **Henderson v. Henderson**. Affirmed. Moore, Irwin, and Cassel, Judges.

No. A-07-1171: **State v. Zimmering**. Affirmed. Sievers, Moore, and Cassel, Judges.

†No. A-07-1196: **State v. Hansen**. Affirmed. Cassel, Irwin, and Moore, Judges.

No. A-07-1221: **Walker v. Arriola**. Affirmed. Sievers, Irwin, and Carlson, Judges.

No. A-07-1226: **State v. Maring**. Affirmed. Inbody, Chief Judge, and Sievers and Carlson, Judges.

No. A-07-1247: **Garcia v. Chimney Rock Villa**. Affirmed. Sievers, Moore, and Cassel, Judges.

No. A-07-1248: **In re Interest of Terra K**. Reversed and remanded with directions. Inbody, Chief Judge, and Irwin and Carlson, Judges.

No. A-07-1249: **Gabel v. Gabel**. Affirmed. Sievers, Judge, and Inbody, Chief Judge, and Carlson, Judge.

No. A-07-1252: **State v. Greuter**. Affirmed. Cassel, Sievers, and Moore, Judges.

†No. A-07-1259: **In re Interest of Madison S**. Affirmed. Irwin, Judge, and Inbody, Chief Judge, and Carlson, Judge.

No. A-07-1260: **In re Interest of Abraham R. & Isabelle D**. Reversed and remanded with directions. Carlson, Judge, and Inbody, Chief Judge, and Irwin, Judge.

No. A-07-1261: **Hartford v. Hartford**. Affirmed. Inbody, Chief Judge, and Moore and Cassel, Judges.

†No. A-07-1264: **State v. Kurtzhals**. Reversed and vacated, and cause remanded with directions. Inbody, Chief Judge, and Sievers and Carlson, Judges.

No. A-07-1281: **State v. Worm**. Affirmed. Cassel, Sievers, and Moore, Judges.

†No. A-07-1295: **In re Interest of Courtney S. et al**. Affirmed. Irwin, Judge, and Inbody, Chief Judge, and Carlson, Judge.

No. A-07-1312: **In re Interest of LeTwann P**. Affirmed. Inbody, Chief Judge, and Irwin and Carlson, Judges.

†No. A-07-1335: **State v. Tiller**. Affirmed. Moore, Sievers, and Cassel, Judges.

†No. A-07-1351: **Clif-Tex Land & Livestock v. First Dakota Nat. Bk**. Affirmed. Moore, Irwin, and Cassel, Judges.

No. A-07-1360: **In re Interest of Alexis S**. Affirmed. Irwin, Judge, and Inbody, Chief Judge, and Carlson, Judge.

No. A-07-1361: **In re Interest of Zander T**. Affirmed. Irwin, Judge, and Inbody, Chief Judge, and Carlson, Judge.

No. A-07-1362: **In re Interest of Christian S**. Affirmed. Irwin, Judge, and Inbody, Chief Judge, and Carlson, Judge.

No. A-08-004: **Omni Behavioral Health v. Keenan Ins. Agency**. Affirmed in part, and in part reversed and remanded with directions. Sievers, Judge, and Inbody, Chief Judge, and Carlson, Judge.

No. A-08-027: **In re Interest of Dante T**. Affirmed. Inbody, Chief Judge, and Irwin and Carlson, Judges.

No. A-08-035: **State v. Martinez**. Affirmed. Carlson, Judge, and Inbody, Chief Judge, and Sievers, Judge.

†Nos. A-08-036 through A-08-038: **In re Interest of April E. et al**. Affirmed. Sievers, Moore, and Cassel, Judges.

†No. A-08-050: **In re Interest of Dakota W. et al**. Affirmed. Carlson, Judge, and Inbody, Chief Judge, and Irwin, Judge.

No. A-08-051: **In re Interest of LaReina S**. Affirmed. Cassel, Irwin, and Moore, Judges.

†No. A-08-057: **State v. Miller**. Reversed and remanded. Sievers, Judge (1-judge).

†No. A-08-076: **In re Interest of Jazzmine W**. Affirmed in part, and in part reversed. Sievers, Judge, and Inbody, Chief Judge, and Carlson, Judge.

No. A-08-098: **State v. Grinvalds**. Affirmed. Irwin, Moore, and Cassel, Judges.

†No. A-08-252: **In re Interest of Antoine L**. Affirmed. Carlson, Judge, and Inbody, Chief Judge, and Sievers, Judge.

LIST OF CASES DISPOSED OF WITHOUT OPINION

No. A-02-148: **Davis v. Jones**. Appeal dismissed as moot. See rule 7A(2).

No. A-04-1206: **Neitzke v. Neitzke**. Affirmed. See rule 7A(1).

No. A-06-330: **Maxon v. Farmers Mut. Ins. of Nebraska**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-06-457: **USA Outdoors v. Dinsy, L.L.C**. Stipulation allowed; appeal dismissed.

No. A-06-536: **Foster v. US Bancorp Piper Jaffray**. Stipulation allowed; appeal dismissed; each party to pay own costs.

No. A-06-689: **Kush v. Kush**. Appeal dismissed. See, rule 7A(2); *Wagner v. Wagner*, 16 Neb. App. 328, 743 N.W.2d 782 (2008); *Peterson v. Peterson*, 14 Neb. App. 778, 714 N.W.2d 793 (2006). See, also, *City of Ashland v. Ashland Salvage*, 271 Neb. 362, 711 N.W.2d 861 (2006); *Hosack v. Hosack*, 267 Neb. 934, 678 N.W.2d 746 (2004).

No. A-06-826: **Hanus v. County Planning Comm**. Appeal dismissed. See, rule 7A(2); *Smith v. City of Papillion*, 270 Neb. 607, 705 N.W.2d 584 (2005).

No. A-06-845: **Hauserman v. Department of Motor Vehicles**. Stipulation of parties for summary reversal considered and granted. Order of district court reversed with directions to vacate order of director of Department of Motor Vehicles revoking operator's license of appellant.

No. A-06-858: **City of Omaha v. Tract No. 1**. Affirmed. See, rule 7A(1); *Washington v. Qwest Communications Corp.*, 270 Neb. 520, 704 N.W.2d 542 (2005); *Patterson v. City of Lincoln*, 250 Neb. 382, 550 N.W.2d 650 (1996).

No. A-06-908: **Jensen v. Sedlacek**. Affirmed. See rule 7A(1).

No. A-06-1038: **Reeder v. Sliva**. Appeal dismissed as moot.

No. A-06-1139: **Grothe v. Neth**. Affirmed. See rule 7A(1).

No. A-06-1171: **State v. Arredondo**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, rule 7B(2); *State v. McGhee*, 274 Neb. 660, 742 N.W.2d 497 (2007).

No. A-06-1188: **Wingert v. Kopecky**. Reversed and vacated, and cause remanded for further proceedings.

No. A-06-1205: **Miller v. Neth**. Pursuant to stipulation of parties, matter summarily reversed. District court is directed to enter order reversing order of Department of Motor Vehicles.

No. A-06-1258: **Tyler v. Greenfield**. Affirmed. See rule 7A(1).

No. A-06-1280: **In re Trust of Barger**. Summarily affirmed. See, rule 7A(1); *In re Interest of C.K., L.K., and G.K.*, 240 Neb. 700, 484 N.W.2d 68 (1992); *State v. Ryan*, 233 Neb. 74, 444 N.W.2d 610 (1989).

No. A-06-1356: **Pittman v. Department of Corr. Servs**. Summarily affirmed. See, rule 7A(1); *Cole v. Isherwood*, 271 Neb. 684, 716 N.W.2d 36 (2006); *Cole v. Isherwood*, 264 Neb. 985, 653 N.W.2d 821 (2002); *Moore v. Grammer*, 232 Neb. 795, 442 N.W.2d 861 (1989).

No. A-06-1374: **Duerr v. Bohaty**. Affirmed. See rule 7A(1).

No. A-06-1385: **Sutton-Vajgrt v. Vajgrt**. Affirmed. See, rule 7A(1); *Liming v. Liming*, 272 Neb. 534, 723 N.W.2d 89 (2006); *Kellner v. Kellner*, 8 Neb. App. 316, 593 N.W.2d 1 (1999).

No. A-06-1445: **Boell v. Neth**. Reversed.

No. A-06-1465: **Skoog v. Skoog**. Affirmed. See, rule 7A(1); *Finney v. Finney*, 273 Neb. 436, 730 N.W.2d 351 (2007).

No. A-07-022: **Sandman v. Sandman**. Motion of appellant to dismiss appeal sustained; appeal dismissed; each party to pay own costs.

No. A-07-047: **Jones v. Jones**. Affirmed. See, rule 7A(1); *Kramer v. Kramer*, 15 Neb. App. 518, 731 N.W.2d 615 (2007).

No. A-07-049: **Tyler v. Warren**. Affirmed. See, rule 7A(1); Neb. Rev. Stat. § 13-910(7) (Cum. Supp. 2006); *Johnson v. State*, 270 Neb. 316, 700 N.W.2d 620 (2005).

No. A-07-061: **State v. Morris**. Affirmed. See rule 7A(1).

No. A-07-098: **State v. Cruz**. Affirmed. See, rule 7A(1); *State v. Nelson*, 274 Neb. 304, 739 N.W.2d 199 (2007).

No. A-07-100: **In re Testamentary Trust of Leising**. Stipulation allowed; appeal dismissed.

Nos. A-07-112, A-07-188, A-07-198: **Arias v. Department of Corr. Servs**. Affirmed. See, rule 7A(1); Neb. Rev. Stat. §§ 25-2301 through 25-2310 (Cum. Supp. 2006); *City of Elkhorn v. City of Omaha*, 272 Neb. 867, 725 N.W.2d 792 (2007); *Heathman v. Kenney*, 263 Neb. 966, 644 N.W.2d 558 (2002).

No. A-07-122: **In re Name Change of Schreiter**. Affirmed. See, rule 7A(1); *Minnig v. Nelson*, 9 Neb. App. 427, 613 N.W.2d 24 (2000).

No. A-07-137: **Gruhn v. Gruhn**. Affirmed. See, rule 7A(1); *Millatmal v. Millatmal*, 272 Neb. 452, 723 N.W.2d 79 (2006); *Brockman v. Brockman*, 264 Neb. 106, 646 N.W.2d 594 (2002).

No. A-07-140: **State v. Roberts**. Affirmed. See, rule 7A(1); *Roe v. Flores-Ortega*, 528 U.S. 470, 120 S. Ct. 1029, 145 L. Ed. 2d 985 (2000); *Strickland v. Washington*, 466 U.S. 688, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); *State v. Moore*, 272 Neb. 71, 718 N.W.2d 537 (2006); *State v. Moyer*, 271 Neb. 776, 715 N.W.2d 565 (2006); *State v. Wagner*, 271 Neb. 253, 710 N.W.2d 627 (2006).

No. A-07-141: **McCarty v. Sidney Community Ctr. Found**. Affirmed. See rule 7A(1).

No. A-07-144: **Lamar Co. v. City of Fremont**. Appeal dismissed. See rule 7A(2).

No. A-07-154: **Mengedoht v. Robinson**. Affirmed. See, rule 7A(1); *Smeal Fire Apparatus Co. v. Kreikemeier*, 271 Neb. 616, 715 N.W.2d 134 (2006); *In re Application of Niklaus, Niklaus v. Holloway*, 144 Neb. 503, 13 N.W.2d 655 (1944).

No. A-07-175: **EPCO Carbon Dioxide Products v. Abengoa Bioenergy Corp**. Stipulation considered; appeal dismissed.

No. A-07-206: **Boman v. Boman**. Affirmed in part, and in part dismissed. See rule 7A(1).

No. A-07-259: **State v. Warren**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, rule 7B(2); Neb. Rev. Stat. § 29-1207(4)(a) (Reissue 1995); *State v. Karch*, 263 Neb. 230, 639 N.W.2d 118 (2002); *State v. Tucker*, 259 Neb. 225, 609 N.W.2d 306 (2000); *State v. Ebert*, 235 Neb. 330, 455 N.W.2d 165 (1990).

No. A-07-273: **Seldin v. Korman Seldin Silver River Dev. Co**. Motion of appellant to dismiss appeal sustained; appeal dismissed with prejudice; each party to pay own costs.

No. A-07-288: **Davis v. Department of Corr. Servs**. Affirmed. See, rule 7A(1); *Witmer v. Nebraska Dept. of Corr. Servs*., 13 Neb. App. 297, 691 N.W.2d 185 (2005).

No. A-07-299: **In re Estate of Wilson**. Stipulation allowed; appeal dismissed.

No. A-07-304: **Chmiel v. Chmiel**. Affirmed. See, rule 7A(1); *Millatmal v. Millatmal*, 272 Neb. 452, 723 N.W.2d 79 (2006); *Bauerle v. Bauerle*, 263 Neb. 881, 644 N.W.2d 128 (2002).

No. A-07-307: **Neilan v. Neilan**. Motion of appellee for summary dismissal sustained; appeal dismissed. See, rule 7B(1); *Smith v. Lincoln Meadows Homeowners Assn*., 267 Neb. 849, 678 N.W.2d 726 (2004).

No. A-07-318: **State v. Puig-Lopez**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, rule 7B(2); Neb. Rev. Stat. § 27-608(2) (Reissue 1995).

No. A-07-321: **State v. Roberts**. Summarily affirmed. See, rule 7A(1); *Roe v. Flores-Ortega*, 528 U.S. 470, 120 S. Ct. 1029, 145 L. Ed. 2d 985 (2000); *State v. Deckard*, 272 Neb. 410, 722 N.W.2d 55 (2006); *State v. Wagner*, 271 Neb. 253, 710 N.W.2d 627 (2006).

No. A-07-326: **Dinslage v. Department of Motor Vehicles**. Stipulation of parties for summary reversal sustained. Order of district court reversed with directions to vacate order of director of Department of Motor Vehicles revoking operator's license of appellant. See *Snyder v. Department of Motor Vehicles*, 274 Neb. 168, 736 N.W.2d 731 (2007).

No. A-07-340: **State v. Martinez**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, rule 7B(2); *State v. Thurman*, 273 Neb. 518, 730 N.W.2d 805 (2007); *State v. Decker*, 261 Neb. 382, 622 N.W.2d 903 (2001); *State v. Harrison*, 255 Neb. 990, 588 N.W.2d 556 (1999).

No. A-07-350: **State v. Balash**. Motion of appellee for summary affirmance sustained; appellant's conviction affirmed. See, rule 7B(2); Neb. Ct. R. of Cty. Cts. 52(I)(G); *State v. Delgado*, 269 Neb. 141, 690 N.W.2d 787 (2005).

No. A-07-356: **Williams v. Neth**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-07-366: **State v. Buechel**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, rule 7B(2); Neb. Rev. Stat. § 60-6,197(4) (Reissue 2004); *State v. Allen*, 269 Neb. 69, 690 N.W.2d 582 (2005).

No. A-07-367: **State v. Maas**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-07-369: **State v. Poole**. Motion of appellee for summary affirmance sustained; judgment affirmed. See *State v. Segura*, 265 Neb. 903, 660 N.W.2d 512 (2003).

No. A-07-372: **Evers v. Sarpy County**. Affirmed. See, rule 7A(1); Neb. Rev. Stat. § 13-901 et seq. (Reissue 1997 & Cum. Supp. 2006); *Anderson v. Wells Fargo Fin. Accept.*, 269 Neb. 595, 694 N.W.2d 625 (2005); *Weeder v. Central Comm. College*, 269 Neb. 114, 691 N.W.2d 508 (2005); *Jessen v. Malhotra*, 266 Neb. 393, 665 N.W.2d 586 (2003); *Stiver v. Allsup, Inc.*, 255 Neb. 687, 587 N.W.2d 77 (1998).

No. A-07-379: **Flynn v. Neth**. Affirmed. See, rule 7A(1); *Betterman v. Department of Motor Vehicles*, 273 Neb. 178, 728 N.W.2d 570 (2007); *Robbins v. Neth*, 273 Neb. 115, 728 N.W.2d 109 (2007); *Urwiller v. Neth*, 263 Neb. 429, 640 N.W.2d 417 (2002).

No. A-07-380: **State v. Young**. Affirmed. See rule 7A(1). See, also, *State v. Iromuanya*, 272 Neb. 178, 719 N.W.2d 263 (2006); *State v. Heckman*, 239 Neb. 25, 473 N.W.2d 416 (1991).

No. A-07-381: **Burnette v. Burnette**. By order of the court, appeal dismissed for failure to file briefs.

No. A-07-399: **State v. Katz**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-07-405: **State v. Hightower**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

Nos. A-07-409, A-07-415: **State v. Charbonneau**. Motions of appellee for summary affirmance sustained; judgments affirmed. See rule 7B(2).

Nos. A-07-436, A-07-437: **State v. Reising**. Affirmed. See, rule 7A(1); *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); *State v. York*, 273 Neb. 660, 731 N.W.2d 597 (2007); *State v. Moore*, 272 Neb. 71, 718 N.W.2d 537 (2006); *State v. Boppre*, 252 Neb. 935, 567 N.W.2d 149 (1997).

Nos. A-07-443, A-07-444: **State v. Trump**. Affirmed. See, rule 7A(1); Neb. Rev. Stat. § 25-1329 (Cum. Supp. 2006); *State v. Sims*, 272 Neb. 811, 725 N.W.2d 175 (2006); *State v. Gonzalez-Faguaga*, 266 Neb. 72, 662 N.W.2d 581 (2003).

No. A-07-452: **Plettner v. Nebraska Medical Center**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-07-453: **Hecker v. Hecker**. Affirmed. See § 2-107(A)(1).

No. A-07-476: **State v. Miller**. Motion of appellee for summary affirmance sustained; judgment affirmed. See *State v. Segura*, 265 Neb. 903, 660 N.W.2d 512 (2003).

No. A-07-477: **State v. Ellis**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-07-478: **State v. Gutierrez-Pizano**. Affirmed. See, rule 7A(1); *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); *State v. Moore*, 272 Neb. 71, 718 N.W.2d 537 (2006); *State v. Silvers*, 255 Neb. 702, 587 N.W.2d 325 (1998).

No. A-07-479: **Harris v. Heath**. By order of the court, appeal dismissed for failure to file briefs.

No. A-07-480: **Perkins v. Perkins**. Affirmed. See, rule 7A(1); *Millatmal v. Millatmal*, 272 Neb. 452, 723 N.W.2d 79 (2006); *Kalkowski v. Kalkowski*, 258 Neb. 1035, 607 N.W.2d 517 (2000); *Parde v. Parde*, 258 Neb. 101, 602 N.W.2d 657 (1999).

No. A-07-481: **Refior v. Neth**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, rule 7B(2); *Betterman v. Department of Motor Vehicles*, 273 Neb. 178, 728 N.W.2d 570 (2007); *Connelly v. Department of Motor Vehicles*, 9 Neb. App. 708, 618 N.W.2d 715 (2000).

No. A-07-482: **Columbia Credit Servs. v. Whitney**. Affirmed. See, rule 7A(1); Neb. Rev. Stat. § 25-2613(b) (Cum. Supp. 2006); Del. Code Ann. tit. 18, § 5719(b) (1999) (Delaware).

No. A-07-484: **Clay v. Neth**. Affirmed. See, rule 7A(1); *Yenney v. Nebraska Dept. of Motor Vehicles*, 15 Neb. App. 446, 729 N.W.2d 95 (2007).

No. A-07-485: **Mathews v. Mathews**. Affirmed. See, rule 7A(1); Neb. Rev. Stat. § 42-366(2) (Reissue 2004); *Gress v. Gress*, 274 Neb. 686, 743 N.W.2d 67 (2007).

Nos. A-07-487 through A-07-489: **State v. Gooch**. Motions of appellee for summary affirmance sustained; judgments affirmed. See, rule 7B(2); *State v. Thurman*, 273 Neb. 518, 730 N.W.2d 805 (2007); *State v. Decker*, 261 Neb. 382, 622 N.W.2d 903 (2001); *State v. Harrison*, 255 Neb. 990, 588 N.W.2d 556 (1999).

No. A-07-494: **Mortgage Express v. Tudor Ins. Co**. Appeal dismissed. See rule 7A(2).

No. A-07-501: **State v. Cook**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-07-502: **State v. Cook**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-07-506: **State v. Rodwell**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, rule 7B(2); *State v. Thurman*, 273 Neb. 518, 730 N.W.2d 805 (2007); *State v. Decker*, 261 Neb. 382, 622 N.W.2d 903 (2001); *State v. Harrison*, 255 Neb. 990, 588 N.W.2d 556 (1999); *State v. Bunner*, 234 Neb. 879, 453 N.W.2d 97 (1990).

Nos. A-07-514 through A-07-516: **State v. Stubben**. Motions of appellee for summary affirmance sustained; judgments affirmed. See rule 7B(2).

No. A-07-519: **Freeburger v. Department of Motor Vehicles**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, rule 7B(2); Neb. Rev. Stat. § 84-917(5)(a) (Reissue 1999); *State v. Ball*, 271 Neb. 140, 710 N.W.2d 592 (2006).

No. A-07-520: **Hokom v. Neth**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, rule 7B(2); *Betterman v. Department of Motor Vehicles*, 273 Neb. 178, 728 N.W.2d 570 (2007); *Urwiller v. Neth*, 263 Neb. 429, 640 N.W.2d 417 (2002).

No. A-07-524: **Caswell v. Caswell**. Motion of appellant/cross-appellee for summary affirmance sustained; judgment affirmed. See, rule 7B(2); *Worth v. Kolbeck*, 273 Neb. 163, 728 N.W.2d 282 (2007); *Millatmal v. Millatmal*, 272 Neb. 452, 723 N.W.2d 79 (2006).

No. A-07-526: **State v. Hogan**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-07-534: **Haberer v. Neth**. Affirmed. See, rule 7A(1); *Moyer v. Nebraska Dept. of Motor Vehicles*, 275 Neb. 688, 747 N.W.2d 924 (2008).

Nos. A-07-535, A-07-536: **State v. Baker**. Motions of appellee for summary affirmance sustained; judgments affirmed. See rule 7B(2).

No. A-07-540: **State v. Lia**. Motion of appellee for summary affirmance sustained; judgment affirmed. See *State v. Segura*, 265 Neb. 903, 660 N.W.2d 512 (2003).

No. A-07-542: **Grass v. Neth**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2). See, also, 247 Neb. Admin. Code, ch. 1, § 1.008.01A (2005).

No. A-07-544: **First Colony Life Ins. Co. v. Meeks**. Affirmed. See rule 7A(1).

No. A-07-545: **Eisenman v. Eisenman**. Summarily affirmed. See, rules 7A(1) and 9E; *Collett v. Collett*, 270 Neb. 722, 707 N.W.2d 769 (2005); *Desjardins v. Desjardins*, 239 Neb. 878, 479 N.W.2d 451 (1992).

No. A-07-546: **State v. Foreman**. Motion of appellee for summary affirmance sustained; judgment affirmed. See *State v. Segura*, 265 Neb. 903, 660 N.W.2d 512 (2003).

No. A-07-560: **Race v. Department of Motor Vehicles**. Stipulation for summary reversal allowed; judgment of district court reversed, and cause remanded with directions to vacate order of Department of Motor Vehicles. See, rule 7C; *Snyder v. Department of Motor Vehicles*, 274 Neb. 168, 736 N.W.2d 731 (2007); *Honda Cars of Bellevue v. American Honda Motor Co.*, 261 Neb. 923, 628 N.W.2d 661 (2001).

No. A-07-561: **Butler v. Butler**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, rule 7B(2); *Millatmal v. Millatmal*, 272 Neb. 452, 723 N.W.2d 79 (2006).

No. A-07-562: **Gibbons v. Health & Human Servs**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-07-565: **State v. Werth**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-07-569: **State v. Holder**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, rule 7B(2); *State v. Segura*, 265 Neb. 903, 660 N.W.2d 512 (2003).

No. A-07-572: **In re Interest of Markice M**. Appeal dismissed. See, rule 7A(2); Neb. Rev. Stat. §§ 43-287.01 through 43-287.06 (Reissue 2004); *In re Interest of Jeffrey R.*, 251 Neb. 250, 557 N.W.2d 220 (1996).

No. A-07-573: **State v. Clayton**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-07-574: **State v. Stortz**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-07-575: **State v. Pasowicz**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, rule 7B(2); *State v. Eberly*, 271 Neb. 893, 716 N.W.2d 671 (2006); *State v. Hisey*, 15 Neb. App. 100, 723 N.W.2d 99 (2006).

No. A-07-577: **Thornburg v. Thornburg**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-07-579: **Dugan v. Jensen**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rules 7B(2) and 9.

No. A-07-581: **State v. Hansen**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, rule 7B(2); *State v. Thurman*, 273 Neb. 518, 730 N.W.2d 805 (2007); *State v. Valdez*, 239 Neb. 453, 476 N.W.2d 814 (1991).

No. A-07-582: **Metropolitan Utilities Dist. v. Liberty Dev. Corp**. Appeal dismissed. See, rule 7A(2); *Murray Constr. Servs. v. Meco-Henne Contracting*, 10 Neb. App. 316, 633 N.W.2d 915 (2001).

No. A-07-583: **72/370 West v. Ritter's Inc**. Motion of appellant to dismiss appeal sustained; appeal dismissed with prejudice.

No. A-07-586: **State v. Curry**. Appeal dismissed. See, rule 7A(2); Neb. Rev. Stat. § 29-2103(3) (Cum. Supp. 2006); *State v. Veatch*, 16 Neb. App. 50, 740 N.W.2d 817 (2007); *State v. Hanus*, 3 Neb. App. 881, 534 N.W.2d 332 (1995).

No. A-07-587: **State v. Schaefer**. Affirmed. See, rule 7A(1); *State v. Iromuanya*, 272 Neb. 178, 719 N.W.2d 263 (2006); *State v. Seaman*, 237 Neb. 916, 468 N.W.2d 121 (1991); *State v. Clark*, 236 Neb. 475, 461 N.W.2d 576 (1990).

No. A-07-589: **State v. Faltys**. Motion of appellee for summary affirmance sustained. See, *State v. Van*, 268 Neb. 814, 688 N.W.2d 600 (2004); *State v. Morrow*, 220 Neb. 247, 369 N.W.2d 89 (1985). See, also, *State v. Segura*, 265 Neb. 903, 660 N.W.2d 512 (2003).

No. A-07-590: **State v. Mudloff**. Affirmed. See, rule 7A(1); *State v. Burkhardt*, 258 Neb. 1050, 607 N.W.2d 512 (2000); *State v. Pierson*, 239 Neb. 350, 476 N.W.2d 544 (1991).

No. A-07-594: **State v. Davlin**. By order of the court, appeal dismissed for failure to file briefs.

No. A-07-595: **State v. Croft**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, rule 7B(2); *State v. Brown*, 268 Neb. 943, 689 N.W.2d 347 (2004); *State v. Losinger*, 268 Neb. 660, 686 N.W.2d 582 (2004).

No. A-07-597: **State v. Greenwood**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-07-599: **State v. Flemons**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, rule 7B(2); *State v. Thurman*, 273 Neb. 518, 730 N.W.2d 805 (2007); *State v. Van*, 268 Neb. 814, 688 N.W.2d 600 (2004); *State v. Decker*, 261 Neb. 382, 622 N.W.2d 903 (2001); *State v. Harrison*, 255 Neb. 990, 588 N.W.2d 556 (1999).

No. A-07-609: **State v. Condoluci**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-07-611: **State v. Jacquez**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, rule 7B(2); *State v. Segura*, 265 Neb. 903, 660 N.W.2d 512 (2003).

No. A-07-612: **Carlson v. Good**. Motion of appellee for summary dismissal sustained; appeal dismissed.

No. A-07-618: **State v. Leeds**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-07-619: **State v. Clauff**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, rule 7B(2); *State v. Thurman*, 273 Neb. 518, 730 N.W.2d 805 (2007); *State v. Decker*, 261 Neb. 382; 622 N.W.2d 903 (2001); *State v. Harrison*, 255 Neb. 990, 588 N.W.2d 556 (1999).

No. A-07-621: **State v. Meyer**. Motion of appellee for summary affirmance sustained. See, *State v. Keen*, 272 Neb. 123, 718 N.W.2d 494 (2006); *State v. Tonge*, 217 Neb. 747, 350 N.W.2d 571 (1984).

No. A-07-627: **State v. Alsidez**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-07-630: **Halac v. Girton**. Appeal dismissed. See, rule 7A(2); Neb. Rev. Stat. § 25-1315 (Cum. Supp. 2006); *Cerny v. Todco Barricade Co.*, 273 Neb. 800, 733 N.W.2d 877 (2007).

No. A-07-635: **Shepard v. Department of Corrections**. Summarily affirmed. See rule 7A(1).

No. A-07-637: **Hallett v. Department of Motor Vehicles**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, rule 7B(2); *Snyder v. Department of Motor Vehicles*, 274 Neb. 168, 736 N.W.2d 731 (2007); *Scott v. State*, 13 Neb. App. 867, 703 N.W.2d 266 (2005).

No. A-07-643: **State v. Lawton**. Motion of appellee for summary affirmance sustained; judgment affirmed. See *State v. Segura*, 265 Neb. 903, 660 N.W.2d 512 (2003).

No. A-07-644: **State v. Caniglia**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, rule 7B(2); *State v. Karch*, 263 Neb. 230, 639 N.W.2d 118 (2002).

No. A-07-645: **State v. Isaacs**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-07-648: **Timmerman v. Neth**. Appeal dismissed as filed out of time. See *Goodman v. City of Omaha*, 274 Neb. 539, 742 N.W.2d 26 (2007).

No. A-07-650: **State v. Helmstadter-Whitlow**. Motion of appellee for summary affirmance granted. See rule 7B(2).

No. A-07-653: **State v. Chae**. Motion of appellee for summary affirmance sustained. See rule 7B(2).

No. A-07-657: **Mengedoht v. Samuelson**. Appellee Samuelson's motion for summary affirmance sustained. See rule 7B(2). Summarily affirmed as to remaining appellees. See rule 7A(1). See, also, *Billups v. Troia*, 253 Neb. 295, 570 N.W.2d 706 (1997); *Estate of Colman v. Redford*, 179 Neb. 270, 137 N.W.2d 822 (1965).

No. A-07-658: **In re Interest of Renae J**. By order of the court, appeal dismissed for failure to file briefs.

No. A-07-662: **State v. Hennessy**. By order of the court, appeal dismissed for failure to file briefs.

No. A-07-665: **State v. Cogill**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

Nos. A-07-666, A-07-667: **State v. Clinesmith**. Motions of appellee for summary affirmance sustained; judgments affirmed. See *State v. Segura*, 265 Neb. 903, 660 N.W.2d 512 (2003).

No. A-07-668: **Smith v. Smith**. By order of the court, appeal dismissed for failure to file briefs.

No. A-07-673: **Harp v. Department of Motor Vehicles**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, rule 7B(2); *Betterman v. Department of Motor Vehicles*, 273 Neb. 178, 728 N.W.2d 570 (2007).

No. A-07-675: **State v. Sanders**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, rule 7B(2); *State v. Thurman*, 273 Neb. 518, 730 N.W.2d 805 (2007); *State v. Decker*, 261 Neb. 382, 622 N.W.2d 903 (2001); *State v. Harrison*, 255 Neb. 990, 588 N.W.2d 556 (1999).

No. A-07-676: **Hanrahan v. Devoer**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-07-679: **State v. Tobar**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-07-683: **State v. Salcedo**. Appellee's suggestion of remand granted. Conviction and sentence vacated, and cause remanded with directions.

No. A-07-685: **Jones v. Gibilisco**. Affirmed. See rule 7A(1).

Nos. A-07-689, A-07-690: **State v. Stovall**. Motions of appellee for summary affirmance sustained; judgments affirmed. See rule 7B(2).

No. A-07-691: **Sturek v. Sturek**. Affirmed. See, rule 7A(1); *Priest v. Priest*, 251 Neb. 76, 554 N.W.2d 792 (1996); *Thiltges v. Thiltges*, 247 Neb. 371, 527 N.W.2d 853 (1995).

Nos. A-07-692, A-07-693: **State v. Raible**. Motions of appellee for summary affirmance sustained; judgments affirmed. See rule 7B(2).

No. A-07-694: **State v. Shaw**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, rule 7B(2); *State v. Segura*, 265 Neb. 903, 660 N.W.2d 512 (2003).

No. A-07-695: **State v. Johnson**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-07-699: **State v. Hausmann**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, rule 7B(2); *State v. Roeder*, 262 Neb. 951, 636 N.W.2d 870 (2001).

No. A-07-701: **State v. Cramer**. Stipulation allowed; appeal dismissed.

No. A-07-703: **Weyers v. Peters**. Summarily affirmed. See rule 7A(1).

No. A-07-706: **Ipson v. Ipson**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-07-710: **State v. Hamilton**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, rule 7B(2); *State v. Thurman*, 273 Neb. 518, 730 N.W.2d 805 (2007); *State v. Decker*, 261 Neb. 382, 622 N.W.2d 903 (2001); *State v. Harrison*, 255 Neb. 990, 588 N.W.2d 556 (1999).

No. A-07-711: **State v. Buckley**. Motion of appellee for summary affirmance sustained; judgment affirmed. See *State v. Segura*, 265 Neb. 903, 660 N.W.2d 512 (2003).

No. A-07-712: **State v. Buller**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-07-713: **City of Omaha v. Kyle**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

Nos. A-07-716, A-07-717: **State v. McCormick**. Motions of appellee for summary affirmance sustained; judgments affirmed. See *State v. Segura*, 265 Neb. 903, 660 N.W.2d 512 (2003).

No. A-07-720: **Ngo v. Bison IMS**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-07-722: **Gross v. Hapner**. Appeal is rendered moot and hereby dismissed.

No. A-07-723: **In re Interest of Kyndra B**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-07-725: **State v. Wraggs**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-07-726: **State v. Golden**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, rule 7B(2); *State v. Kuehn*, 273 Neb. 219, 728 N.W.2d 589 (2007); *State v. Losinger*, 268 Neb. 660, 686 N.W.2d 582 (2004).

No. A-07-727: **Young v. Young**. Motion of appellee for summary affirmance sustained; judgment affirmed.

No. A-07-730: **American Fam. Mut. Ins. Co. v. Allstate Ins**. Affirmed. See, rule 7A(1); Neb. Rev. Stat. § 44-3,128.01 (Reissue 2004); *Blue Cross and Blue Shield v. Dailey*, 268 Neb. 733, 687 N.W.2d 689 (2004).

No. A-07-731: **Grams v. Grams**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-07-733: **State v. Hoffman**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, rule 7B(2); *State v. Segura*, 265 Neb. 903, 660 N.W.2d 512 (2003).

No. A-07-734: **Dowson v. Dowson**. Motion of appellant to dismiss appeal considered; appeal dismissed.

No. A-07-739: **Melgar v. Divercon Construction**. Affirmed. See, rule 7A(1); *Didier v. Ash Grove Cement Co.*, 272 Neb. 28, 718 N.W.2d 484 (2006); *Ray v. Argos Corp.*, 259 Neb. 799, 612 N.W.2d 246 (2000); *Parrish v. Omaha Pub. Power Dist.*, 242 Neb. 783, 496 N.W.2d 902 (1993).

No. A-07-742: **Zion Lutheran Church v. Mehner**. Appeal dismissed as prematurely filed. See, rule 7A(2); Neb. Rev. Stat. § 25-1912(1) and (2) (Cum. Supp. 2006).

No. A-07-746: **Mohler v. Manka**. Affirmed. See, rule 7A(1); *City of Gordon v. Montana Feeders, Corp.*, 273 Neb. 402, 730 N.W.2d 387 (2007); *Pliess v. Barnes*, 260 Neb. 770, 619 N.W.2d 825 (2000); *Higginbotham v. Sukup*, 15 Neb. App. 821, 737 N.W.2d 910 (2007).

Nos. A-07-749, A-07-854: **In re Estate of Weibel**. Motions of appellant to dismiss appeal sustained; appeals dismissed.

No. A-07-750: **In re Interest of Kyle S**. Appeal dismissed.

No. A-07-753: **State v. Watson**. Stipulation allowed; appeal dismissed.

No. A-07-754: **State v. Hernandez**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-07-755: **State v. Toliver**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-07-758: **Archie v. Archie**. Affirmed. See, rule 7A(1); Neb. Rev. Stat. §§ 43-1803 (Reissue 2004) and 42-364 (Cum. Supp. 2006); *McLaughlin v. McLaughlin*, 264 Neb. 232, 647 N.W.2d 577 (2002); *Conn v. Conn*, 15 Neb. App. 77, 722 N.W.2d 507 (2006); *Bruce v. Bruce*, 11 Neb. App. 548, 656 N.W.2d 281 (2003).

No. A-07-760: **Olson v. Neth**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, rule 7B(2); *Moyer v. Nebraska Dept. of Motor Vehicles*, 275 Neb. 688, 747 N.W.2d 924 (2008); *Betterman v. Department of Motor Vehicles*, 273 Neb. 178, 728 N.W.2d 570 (2007).

No. A-07-761: **Shemwell v. Hawk, Inc**. Affirmed. See, rule 7A(1); *Clark v. Clark*, 275 Neb. 276, 746 N.W.2d 132 (2008).

No. A-07-763: **State v. Schrunk**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-07-765: **State v. Collins**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, rule 7B(2); *State v. Thurman*, 273 Neb. 518, 730 N.W.2d 805 (2007); *State v. Decker*, 261 Neb. 382, 622 N.W.2d 903 (2001); *State v. Harrison*, 255 Neb. 990, 588 N.W.2d 556 (1999).

No. A-07-766: **Positive Property Mgmt. v. Maple, Inc**. Affirmed. See, rule 7A(1); *Eihusen v. Eihusen*, 272 Neb. 462, 723 N.W.2d 60 (2006).

No. A-07-770: **In re Interest of Fochelle S**. Affirmed. See, rule 7A(1); *In re Interest of Jagger L.*, 270 Neb. 828, 708 N.W.2d 802 (2006).

Nos. A-07-774, A-07-775: **State v. Brown**. Motions of appellee for summary dismissal sustained; appeals dismissed. See, rule 7B(1); Neb. Rev. Stat. §§ 25-1912(1) and 29-2103 (Cum. Supp. 2006); *State v. Dunster*, 270 Neb. 773, 707 N.W.2d 412 (2005); *State v. Gass*, 269 Neb. 834, 697 N.W.2d 245 (2005); *State v. Miller*, 240 Neb. 297, 481 N.W.2d 580 (1992); *State v. Veatch*, 16 Neb. App. 50, 740 N.W.2d 817 (2007).

No. A-07-776: **State v. Gardner**. Motion of appellee for summary affirmance sustained; judgment affirmed.

No. A-07-782: **CS Equities v. Andrew**. Appeal dismissed. See, rule 7A(2); *Goodman v. City of Omaha*, 274 Neb. 539, 742 N.W.2d 26 (2007).

No. A-07-783: **State v. Sunday**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-07-785: **State v. Gomez**. By order of the court, appeal dismissed for failure to file briefs.

No. A-07-790: **Blanchard v. Nebraska Pub. Power Dist**. Stipulation allowed; appeal dismissed with prejudice; each party to pay own costs.

No. A-07-791: **State on behalf of Thompson v. Thompson**. Affirmed. See, rule 7A(1); *State on behalf of A.E. v. Buckhalter*, 273 Neb. 443, 730 N.W.2d 340 (2007).

No. A-07-792: **State v. Fernandez**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

Nos. A-07-793, A-07-794: **State v. Williams**. Motions of appellee for summary affirmance sustained; judgments affirmed. See rule 7B(2).

No. A-07-796: **State v. Parker**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-07-800: **Haessler v. Haessler**. Affirmed. See, rule 7A(1); *Finney v. Finney*, 273 Neb. 436, 730 N.W.2d 351 (2007); *Collett v. Collett*, 270 Neb. 722, 707 N.W.2d 769 (2005); *Boyle v. Boyle*, 12 Neb. App. 681, 684 N.W.2d 49 (2004).

No. A-07-801: **State v. Pirnie**. By order of the court, appeal dismissed for failure to file briefs.

No. A-07-802: **State on behalf of Schriner v. Schriner**. Affirmed. See, rule 7A(1); *Dartmann v. Dartmann*, 14 Neb. App. 864, 717 N.W.2d 519 (2006); *Rood v. Rood*, 4 Neb. App. 455, 545 N.W.2d 138 (1996).

No. A-07-803: **State on behalf of Schriner v. Schriner**. Affirmed. See, rule 7A(1); *Dartmann v. Dartmann*, 14 Neb. App. 864, 717 N.W.2d 519 (2006); *Rood v. Rood*, 4 Neb. App. 455, 545 N.W.2d 138 (1996).

No. A-07-807: **State v. Malcom**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-07-808: **State v. Kienast**. Motion for summary dismissal sustained for lack of jurisdiction. See *State v. Wilson*, 15 Neb. App. 212, 724 N.W.2d 99 (2006).

No. A-07-815: **State v. O'Keefe**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-07-816: **State v. O'Keefe**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-07-817: **State v. O'Keefe**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-07-818: **State v. O'Keefe**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-07-819: **State v. Hansen**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, rule 7B(2); *State v. Prater*, 268 Neb. 655, 686 N.W.2d 896 (2004).

No. A-07-821: **State v. Riddle**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-07-822: **State v. Carter**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, rule 7B(2); *State v. McLeod*, 274 Neb. 566, 741 N.W.2d 664 (2007); *State v. Lassek*, 272 Neb. 523, 723 N.W.2d 320 (2006).

No. A-07-824: **Davis v. City of Omaha**. Motion of appellant to dismiss appeal sustained; appeal dismissed; each party to pay own costs.

No. A-07-827: **State v. Munoz**. Affirmed. See, rule 7A(1); *State v. Moore*, 272 Neb. 71, 718 N.W.2d 537 (2006).

Nos. A-07-832, A-07-847, A-07-863: **State v. Coyle**. Motions of appellee for summary affirmance sustained; judgments affirmed. See, rule 7B(2); *State v. Thurman*, 273 Neb. 518, 730 N.W.2d 805 (2007); *State v. Decker*, 261 Neb. 382, 622 N.W.2d 903 (2001); *State v. Harrison*, 255 Neb. 990, 588 N.W.2d 556 (1999).

No. A-07-833: **State v. Blankenfeld**. Motion of appellee for summary affirmance sustained; judgment affirmed. See *State v. Segura*, 265 Neb. 903, 660 N.W.2d 512 (2003).

No. A-07-836: **Wolfe v. State Patrol**. Motion of appellant to dismiss appeal sustained; appeal dismissed with prejudice.

No. A-07-838: **State v. Berger**. Motion of appellee for summary affirmance sustained; judgment affirmed. See *State v. Segura*, 265 Neb. 903, 660 N.W.2d 512 (2003).

No. A-07-839: **State v. McCauley**. By order of the court, appeal dismissed for failure to file briefs.

No. A-07-840: **Davis v. Department of Corr. Servs**. By order of the court, appeal dismissed for failure to file briefs.

No. A-07-841: **MBNA American Bank v. Vlasin**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-07-843: **Health & Human Servs. v. Almanza**. By order of the court, appeal dismissed for failure to file briefs.

No. A-07-848: **State v. Sanchez**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-07-852: **State v. Roberson**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-07-856: **State v. Alford**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-07-858: **In re Admin. of Approp. of Waters of Niobrara River**. Motions of appellees for summary dismissal sustained; appeal dismissed. See, rule 7B(1); *In re Applications T-851 & T-852*, 268 Neb. 620, 686 N.W.2d 360 (2004); *Charles Vrana & Son Constr. v. State*, 255 Neb. 845, 587 N.W.2d 543 (1998); *State, ex rel. Cary, v. Cochran*, 138 Neb. 163, 292 N.W. 239 (1940).

No. A-07-861: **Mengedoht v. Newton**. Affirmed. See, rule 7A(1); Neb. Rev. Stat. § 29-2801 (Reissue 1995); *Rehbein v. Clarke*, 257 Neb. 406, 598 N.W.2d 39 (1999); *Sedlacek v. Hann*, 156 Neb. 340, 56 N.W.2d 138 (1952).

No. A-07-865: **State v. Spigner**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-07-866: **Frazier v. Madsen**. By order of the court, appeal dismissed for failure to file briefs.

No. A-07-867: **Breinig v. Breinig**. Motion of appellee for summary dismissal and summary affirmance sustained. Appeal of December 26, 2006, order dismissed; July 11, 2007, order affirmed. See, Neb. Rev. Stat. § 25-531 (Cum. Supp. 2006); *Ptak v. Swanson*, 271 Neb. 57, 709 N.W.2d 337 (2006); *State v. Stuart*, 12 Neb. App. 283, 671 N.W.2d 239 (2003).

No. A-07-868: **German v. Excel Corp**. Affirmed. See, rule 7A(1); *Worline v. ABB/Alstom Power Int. CE Servs.*, 272 Neb. 797, 725 N.W.2d 148 (2006); *Yager v. Bellco Midwest*, 236 Neb. 888, 464 N.W.2d 335 (1991).

No. A-07-869: **Svoboda v. Powell**. Motion of appellant to dismiss appeal sustained; appeal dismissed with prejudice; each party to pay own costs.

No. A-07-872: **State v. Ross**. Motion of appellee for summary affirmance sustained. See *State v. York*, 273 Neb. 660, 731 N.W.2d 597 (2007).

No. A-07-873: **DeGroff v. Neth**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-07-876: **In re Interest of Peter S**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-07-877: **In re Interest of Deng J**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-07-880: **State v. Thompson**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, rule 7B(2); *State v. Clark*, 236 Neb. 475, 461 N.W.2d 576 (1990); *State v. Pawling*, 9 Neb. App. 824, 621 N.W.2d 821 (2000).

No. A-07-883: **Eggert v. Neth**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-07-888: **Cole v. Cole**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-07-889: **State v. Abejide**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-07-891: **State v. Stevens**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-07-895: **State v. Reetz**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-07-896: **Jensen v. Neth**. Motion of appellant for summary dismissal sustained and appellee's cross-appeal denied.

Nos. A-07-897, A-07-898: **State v. Moreno**. Motions of appellee for summary affirmance granted. See rule 7B(2).

No. A-07-899: **State v. Bonner**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-07-900: **State v. Krutilek**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, rule 7B(2); *State v. El-Tabech*, 259 Neb. 509, 610 N.W.2d 737 (2000); *State v. Ryan*, 257 Neb. 635, 601 N.W.2d 473 (1999).

No. A-07-908: **State v. Callahan**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-07-910: **Sheppard v. Department of Motor Vehicles**. Motion of appellant to dismiss appeal sustained; appeal dismissed with prejudice.

No. A-07-912: **State v. McCarthy**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, rule 7B(2); *State v. Thomas*, 268 Neb. 570, 685 N.W.2d 69 (2004).

No. A-07-913: **State v. Madden**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-07-915: **Scheele v. Neth**. Summarily affirmed. See rule 7A(1). See, also, *Betterman v. Department of Motor Vehicles*, 273 Neb. 178, 728 N.W.2d 570 (2007); *Yenney v. Nebraska Dept. of Motor Vehicles*, 15 Neb. App. 446, 729 N.W.2d 95 (2007).

No. A-07-917: **Dugan v. Neth**. Reversed and remanded with directions. See *Stenger v. Department of Motor Vehicles*, 274 Neb. 819, 743 N.W.2d 758 (2008).

No. A-07-918: **Rawlin v. Rawlin**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-07-920: **State v. Hunter**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-07-924: **State v. Elliott**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, rule 7B(2); *State v. Iromuanya*, 272 Neb. 178, 719 N.W.2d 263 (2006); *State v. Aldaco*, 271 Neb. 160, 710 N.W.2d 101 (2006).

No. A-07-929: **State v. Gomez**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-07-930: **State v. Agee**. Affirmed. See, rule 7A(1); *State v. McLeod*, 274 Neb. 566, 741 N.W.2d 664 (2007); *State v. Jones*, 264 Neb. 671, 650 N.W.2d 798 (2002); *State v. Al-Zubaidy*, 263 Neb. 595, 641 N.W.2d 362 (2002).

No. A-07-931: **Houston v. Houston**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, rule 7B(2); Neb. Rev. Stat. § 25-1056 (Cum. Supp. 2006); *Spaghetti Ltd. Partnership v. Wolfe*, 264 Neb. 365, 647 N.W.2d 615 (2002).

No. A-07-934: **State v. Novak**. Summarily affirmed. See, rule 7A(1); *State v. McLeod*, 274 Neb. 566, 741 N.W.2d 664 (2007); *State v. Gass*, 269 Neb. 834, 697 N.W.2d 245 (2005); *State v. Drinkwalter*, 14 Neb. App. 944, 720 N.W.2d 415 (2006).

No. A-07-936: **State v. Bates**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-07-937: **State v. Juracek**. By order of the court, appeal dismissed for failure to file briefs.

No. A-07-938: **Davis v. Houston**. By order of the court, appeal dismissed for failure to file briefs.

No. A-07-940: **In re Interest of Antoine G**. Affirmed. See, rule 7A(1); *In re Interest of Jeffrey K.*, 273 Neb. 239, 728 N.W.2d 606 (2007); *In re Interest of Sarah K.*, 258 Neb. 52, 601 N.W.2d 780 (1999).

No. A-07-941: **Shiers v. Luff**. Affirmed. See, rule 7A(1); *Brandon v. County of Richardson*, 264 Neb. 1020, 653 N.W.2d 829 (2002); *Lis v. Moser Well Drilling & Serv.*, 221 Neb. 349, 377 N.W.2d 98 (1985); *Hornung v. Hatcher*, 205 Neb. 449, 288 N.W.2d 276 (1980).

No. A-07-943: **State v. Ellevold**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-07-944: **State v. Asiala**. Appeal dismissed. See rule 7A(2).

No. A-07-945: **State v. Salts**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-07-946: **State v. McDowell**. By order of the court, appeal dismissed for failure to file briefs.

No. A-07-947: **Hoffman v. Hoffman**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-07-948: **In re Trust of Beller**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-07-950: **State v. Schmutz**. Motion of appellee for summary affirmance sustained; judgment affirmed. See *State v. Segura*, 265 Neb. 903, 660 N.W.2d 512 (2003).

Nos. A-07-951, A-07-1137: **Joyner v. Joyner**. By order of the court, appeals dismissed for failure to file briefs.

No. A-07-954: **Nebraska State Bank of Omaha v. TierOne Bank**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-07-955: **Keith v. Keith**. Motion of appellee for summary dismissal sustained; appeal dismissed. See rule 7B(1).

No. A-07-956: **In re Interest of Al-Brion L. & Brivaughn L**. Appeal dismissed. See, rule 7A(2); *State v. Haase*, 247 Neb. 817, 530 N.W.2d 617 (1995).

No. A-07-958: **Herrick v. Herrick**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-07-961: **State v. Williams**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-07-962: **State v. Doran**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-07-963: **In re Estate of Waite**. Motions of appellees for summary dismissal sustained; appeal dismissed. See, rule 7B(1) and (4); *Waite v. Carpenter*, 3 Neb. App. 879, 533 N.W.2d 917 (1995).

No. A-07-968: **State v. Carter**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-07-970: **In re Estate of Evjen**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-07-971: **Lopez v. Mattison**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, rule 7B(2); *Babbitt v. Hronik*, 261 Neb. 513, 623 N.W.2d 700 (2001).

No. A-07-974: **State v. Streebin**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-07-975: **State v. Stewart**. Appellee's suggestion of remand sustained. Judgment reversed, and cause remanded with directions.

No. A-07-976: **Villarreal v. Ferraguti**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, rule 7B(2); Neb. Rev. Stat. §§ 7-101 (Reissue 1997) and 25-21,188 (Reissue 1995); *Washington v. Conley*, 273 Neb. 908, 734 N.W.2d 306 (2007); *Brummels v. Tomasek*, 273 Neb. 573, 731 N.W.2d 585 (2007); *Heitzman v. Thompson*, 270 Neb. 600, 705 N.W.2d 426 (2005); *Back Acres Pure Trust v. Fahnlander*, 233 Neb. 28, 443 N.W.2d 604 (1989); *Niklaus v. Abel Construction Co.*, 164 Neb. 842, 83 N.W.2d 904 (1957).

No. A-07-977: **Sanford v. Hansen**. Affirmed. See rule 7A(1). See, also, *Domjan v. Faith Regional Health Servs.*, 273 Neb. 877, 735 N.W.2d 355 (2007); *Betterman v. Department of Motor Vehicles*, 273 Neb. 178, 728 N.W.2d 570 (2007); *Woodhouse Ford v. Laflan*, 268 Neb. 722, 687 N.W.2d 672 (2004); *Russell v. Clarke*, 15 Neb. App. 221, 724 N.W.2d 840 (2006).

No. A-07-978: **Frazier v. Price**. By order of the court, appeal dismissed for failure to file briefs.

No. A-07-979: **Calloway v. Great Plains Black Museum**. Appeal dismissed. See, rule 7A(2); Neb. Rev. Stat. § 25-1315 (Cum. Supp. 2006).

No. A-07-984: **State v. Odinaev**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

Nos. A-07-985 through A-07-988: **State v. Schlotfeld**. Affirmed. See, rule 7A(1); Neb. Rev. Stat. § 29-3004 (Reissue 1995); *State v. York*, 273 Neb. 660, 731 N.W.2d 597 (2007); *State v. Ortiz*, 266 Neb. 959, 670 N.W.2d 788 (2003).

No. A-07-990: **Elkhorn Ridge Golf Part. v. Mic-Car, Inc**. Appeal dismissed. See rule 7A(2).

No. A-07-992: **Demasi v. Demasi**. Citation for contempt reversed, and cause remanded for imposition of proper civil remedy or for commencement of criminal proceedings. See, e.g., *City of Beatrice v. Meints*, 12 Neb. App. 276, 671 N.W.2d 243 (2003).

No. A-07-993: **In re Interest of Fochelle S**. By order of the court, appeal dismissed for failure to file briefs.

No. A-07-995: **In re Adoption of William G**. Appeal dismissed.

No. A-07-996: **In re Adoption of Kali G**. Appeal dismissed.

No. A-07-997: **Schaber v. Department of Motor Vehicles**. Motion of appellant to dismiss appeal sustained; appeal dismissed at cost of appellant.

No. A-07-998: **State v. Stabler**. Appeal dismissed. See, rule 7A(2); *State v. Haase*, 247 Neb. 817, 530 N.W.2d 617 (1995).

No. A-07-999: **State v. Simmons**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, rule 7B(2); *State v. Thomas*, 268 Neb. 570, 685 N.W.2d 69 (2004).

No. A-07-1002: **State v. Waegli**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-07-1003: **State ex rel. Linder v. Dahlgren Cattle Co**. Motion of appellee for summary affirmance sustained.

No. A-07-1004: **Dunning v. Gustafson**. Appeal dismissed. See, rule 7A(2); Neb. Rev. Stat. § 25-1315 (Cum. Supp. 2006).

No. A-07-1006: **State v. Caudy**. Motion of appellee for summary affirmance sustained; judgment affirmed. See *State v. Segura*, 265 Neb. 903, 660 N.W.2d 512 (2003).

No. A-07-1007: **Looby v. Cameron**. Appeal dismissed. See, rule 7A(2); *Wicker v. Waldemath*, 238 Neb. 515, 471 N.W.2d 731 (1991).

No. A-07-1008: **Looby v. Wulf**. Appeal dismissed. See, rule 7A(2); *Wicker v. Waldemath*, 238 Neb. 515, 471 N.W.2d 731 (1991).

No. A-07-1012: **State v. Wheeler**. Decision overruling defendant's motion to withdraw guilty plea is reversed, and cause is remanded for further proceedings. See *State v. Curnyn*, 202 Neb. 135, 274 N.W.2d 157 (1979).

No. A-07-1013: **Villotta v. Tuzzio**. Affirmed. See, § 2-107(A)(1); *State on behalf of Kayla T. v. Risinger*, 273 Neb. 694, 731 N.W.2d 892 (2007); *State on behalf of A.E. v. Buckhalter*, 273 Neb. 443, 730 N.W.2d 340 (2007).

No. A-07-1015: **State v. Mattson**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-07-1018: **State v. Coleman**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, rule 7B(2); *State v. Thurman*, 273 Neb. 518, 730 N.W.2d 805 (2007); *State v. Decker*, 261 Neb. 382, 622 N.W.2d 903 (2001); *State v. Harrison*, 255 Neb. 990, 588 N.W.2d 556 (1999).

No. A-07-1019: **McNeil v. Nebraska Beef Ltd**. Affirmed. See rule 7A(1).

No. A-07-1020: **State v. Swoboda**. Motion of appellee for summary affirmance sustained; judgment affirmed. See *State v. Segura*, 265 Neb. 903, 660 N.W.2d 512 (2003).

No. A-07-1021: **State v. Ehlers**. Stipulation of parties for summary reversal sustained. Cause remanded for further proceedings to properly classify offense and for resentencing. See, rule 7C; Neb. Rev. Stat. § 29-4011(1) (Cum. Supp. 2006).

No. A-07-1022: **State v. Welsh**. Judgment vacated, and cause remanded with direction to dismiss. See *State v. Campbell*, 187 Neb. 719, 193 N.W.2d 571 (1972).

No. A-07-1023: **State v. Fuller**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-07-1024: **Dugan v. County of Garden**. By order of the court, appeal dismissed for failure to file briefs.

No. A-07-1025: **State v. Randolph**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-07-1028: **Alfredson v. Neth**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, Neb. Rev. Stat. § 60-6,224 (Reissue 2004); *Betterman v. Department of Motor Vehicles*, 273 Neb. 178, 728 N.W.2d 570 (2007).

No. A-07-1029: **In re Adoption of Akara K**. Motion of appellant to dismiss appeal sustained; appeal dismissed at cost of appellant.

No. A-07-1032: **In re Interest of Christopher B**. By order of the court, appeal dismissed for failure to file briefs.

No. A-07-1034: **Ashby v. Taylor**. Appeal dismissed. See, rule 7A(2); Neb. Rev. Stat. § 25-1902 (Reissue 1995).

No. A-07-1035: **Hawkes v. Department of Corr. Servs**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-07-1045: **Davis v. Department of Corr. Servs**. By order of the court, appeal dismissed for failure to file briefs.

No. A-07-1046: **State v. De Pineda**. Motion of appellee for summary dismissal sustained; appeal dismissed. See, rule 7B(1); *State v. Woods*, 255 Neb. 755, 587 N.W.2d 122 (1998).

No. A-07-1049: **State v. Baker**. Appeal dismissed. See, rule 7A(2); Neb. Rev. Stat. § 25-1912 (Cum. Supp. 2006).

No. A-07-1050: **State v. Torres**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, *State v. Aldaco*, 271 Neb. 160, 710 N.W.2d 101 (2006); *State v. Segura*, 265 Neb. 903, 660 N.W.2d 512 (2003).

No. A-07-1051: **State v. Mick**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-07-1053: **Farmers Bank v. Knopp**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-07-1055: **Dryden v. Wilcox**. Appeal dismissed. See, rule 7A(2); Neb. Rev. Stat. § 25-1315 (Cum. Supp. 2006); *Keef v. State*, 262 Neb. 622, 634 N.W.2d 751 (2001).

No. A-07-1056: **Smith v. Neth**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-07-1057: **State v. Dugan**. Stipulation allowed; appeal dismissed.

No. A-07-1059: **State ex rel. Wagner v. Sebring**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-07-1060: **In re Guardianship & Conservatorship of Anne T**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-07-1061: **Community Bank v. Doubet**. Motion of appellant to dismiss appeal sustained; appeal dismissed at cost of appellant.

No. A-07-1062: **Hinspeter v. Hinspeter**. Appeal dismissed. See, rule 7A(2); *State v. Haase*, 247 Neb. 817, 530 N.W.2d 617 (1995).

No. A-07-1064: **State v. Joseph**. Motion of appellee for summary affirmance sustained; judgment affirmed. See *State v. Segura*, 265 Neb. 903, 660 N.W.2d 512 (2003).

No. A-07-1066: **In re Interest of D.I**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-07-1070: **U.S. Bank, Nat. Assn. v. Drewes**. Appeal dismissed as filed out of time. See, rule 7A(2); Neb. Rev. Stat. § 25-1931 (Cum. Supp. 2006).

No. A-07-1073: **Zion Lutheran Church v. Mehner**. Appeal dismissed. See, rule 7A(2); *State ex rel. Fick v. Miller*, 252 Neb. 164, 560 N.W.2d 793 (1997).

No. A-07-1074: **Tyler v. "Glaze"**. Appeal dismissed. See rule 7A(2). See, also, Neb. Rev. Stat. § 25-1315 (Cum. Supp. 2006).

No. A-07-1076: **State v. Anderson**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-07-1077: **State v. Herman**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-07-1078: **Vlasin v. Ranch Oil Co**. Appeal dismissed. See rule 7A(2).

No. A-07-1079: **State v. Wood**. Appeal dismissed. See, rule 7A(2); Neb. Rev. Stat. § 25-1912 (Cum. Supp. 2006).

No. A-07-1080: **State v. Wood**. Appeal dismissed. See, rule 7A(2); Neb. Rev. Stat. § 25-1912 (Cum. Supp. 2006).

No. A-07-1082: **State v. Benson**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-07-1084: **State v. Sharp**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-07-1085: **State v. McIntosh**. Appeal dismissed. See, rule 7A(2); Neb. Rev. Stat. § 25-1912(1) (Cum. Supp. 2006).

No. A-07-1086: **State v. Walsh**. Motion of appellee for summary affirmance sustained.

No. A-07-1087: **State v. Riggs**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-07-1092: **Kappa Ethanol v. Kearney Cty. Bd. of Equal**. Motion of petitioner-appellant to dismiss appeal sustained; appeal dismissed.

No. A-07-1097: **State v. Vigil**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, rule 7B(2); *State v. Thurman*, 273 Neb. 518, 730 N.W.2d 805 (2007); *State v. Decker*, 261 Neb. 382, 622 N.W.2d 903 (2001); *State v. Harrison*, 255 Neb. 990, 588 N.W.2d 556 (1999).

No. A-07-1098: **Cameron v. Washington Cty. Ct**. Affirmed. See, rule 7A(1); Neb. Rev. Stat. § 30-2470 (Reissue 1995); *State ex rel. Johnson v. Gale*, 273 Neb. 889, 734 N.W.2d 290 (2007).

No. A-07-1101: **State v. Gill**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-07-1107: **State v. Ross**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, rule 7B(2); *State v. Archie*, 273 Neb. 612, 733 N.W.2d 513 (2007); *State v. Pierce*, 248 Neb. 536, 537 N.W.2d 323 (1995); *State v. Osborn*, 241 Neb. 424, 490 N.W.2d 160 (1992).

No. A-07-1110: **State v. Bourke**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-07-1111: **State v. Bourke**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-07-1112: **State v. Strack**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, rule 7B(2); *State v. Thurman*, 273 Neb. 518, 730 N.W.2d 805 (2007); *State v. Decker*, 261 Neb. 382, 622 N.W.2d 903 (2001); *State v. Harrison*, 255 Neb. 990, 588 N.W.2d 556 (1999).

No. A-07-1113: **State v. Black Elk**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-07-1118: **State v. Ferris**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-07-1120: **State v. Benoit**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, rule 7B(2); *State v. Thurman*, 273 Neb. 518, 730 N.W.2d 805 (2007); *State v. Decker*, 261 Neb. 382, 622 N.W.2d 903 (2001); *State v. Harrison*, 255 Neb. 990, 588 N.W.2d 556 (1999).

No. A-07-1122: **Widtfeldt v. Holt Cty. Bd. of Equal**. Appeal dismissed. See, rule 7A(2); Neb. Rev. Stat. § 77-5019(2)(a) (Cum. Supp. 2006). See, also, *Widtfeldt v. Holt Cty. Bd. of Equal.*, 12 Neb. App. 499, 677 N.W.2d 521 (2004).

No. A-07-1123: **State v. Bernhardt**. Motion of appellee for summary affirmance sustained; judgment affirmed. See *State v. Segura*, 265 Neb. 903, 660 N.W.2d 512 (2003).

No. A-07-1127: **State v. Saathoff**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-07-1128: **Ribbe v. Village of Herman**. Appeal dismissed. See, rule 7A(2); *Manske v. Manske*, 246 Neb. 314, 518 N.W.2d 144 (1994).

No. A-07-1129: **State v. Liggins**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

Nos. A-07-1130, A-07-1131: **State v. Sandness**. Motions of appellee for summary affirmance sustained; judgments affirmed. See rule 7B(2).

No. A-07-1133: **Sutton v. Killham**. Appeal dismissed. See rule 7A(2).

No. A-07-1134: **Bohm v. Neth**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, rule 7B(2); *Betterman v. Department of Motor Vehicles*, 273 Neb. 178, 728 N.W.2d 570 (2007); *Hahn v. Neth*, 270 Neb. 164, 699 N.W.2d 32 (2005).

No. A-07-1135: **Epting v. Epting**. Affirmed. See, rule 7A(1); *Simpson v. Simpson*, 275 Neb. 152, 744 N.W.2d 710 (2008); *Morrill County v. Darsaklis*, 7 Neb. App. 489, 584 N.W.2d 36 (1998).

No. A-07-1139: **State v. Walker**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-07-1140: **State v. Harris**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-07-1144: **Young v. Department of Motor Vehicles**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-07-1145: **State v. Capps**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-07-1146: **Anderson v. Anderson**. By order of the court, appeal dismissed for failure to file briefs.

No. A-07-1147: **Appelt v. Hinn**. Appeal dismissed. See, rule 7A(2); *Williams v. Baird*, 273 Neb. 977, 735 N.W.2d 383 (2007); *Keef v. State*, 262 Neb. 622, 634 N.W.2d 751 (2001).

No. A-07-1148: **Tyler v. Baker's Grocery**. Motion of appellant to dismiss appeal sustained; appeal dismissed; each party to pay own costs.

No. A-07-1149: **Harper v. Houston**. Motion of appellee for summary affirmance sustained. See, rule 7B(2); *Kentucky Dept. of Corrections v. Thompson*, 490 U.S. 454, 109 S. Ct. 1904, 104 L. Ed. 2d 506 (1989); *Abdullah v. Gunter*, 242 Neb. 854, 497 N.W.2d 12 (1993).

Nos. A-07-1150, A-07-1157: **State v. Lopez**. Motions of appellant to dismiss appeal sustained; appeals dismissed.

No. A-07-1151: **McVeigh v. McVeigh**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-07-1159: **Hitchcock v. Neth**. Motion of appellee for summary affirmance granted.

No. A-07-1161: **Seifert v. Department of Motor Vehicles**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-07-1163: **U.S. Bank Nat. Assn. v. Kelley**. Motion of appellant to dismiss appeal sustained; appeal dismissed at cost of appellant.

No. A-07-1164: **State v. Ertz**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-07-1165: **State v. Siebrandt**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-07-1166: **State v. Gonzales**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-07-1167: **State v. Tran**. Motion of appellee for summary affirmance sustained. See *State v. Segura*, 265 Neb. 903, 660 N.W.2d 512 (2003).

No. A-07-1168: **State v. Carstens**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, rule 7B(2); *State v. Thurman*, 273 Neb. 518, 730 N.W.2d 805 (2007); *State v. Decker*, 261 Neb. 382, 622 N.W.2d 903 (2001); *State v. Harrison*, 255 Neb. 990, 588 N.W.2d 556 (1999).

No. A-07-1169: **State v. Flood**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, rule 7B(2); *State v. Thurman*, 273 Neb. 518, 730 N.W.2d 805 (2007); *State v. Decker*, 261 Neb. 382, 622 N.W.2d 903 (2001); *State v. Harrison*, 255 Neb. 990, 588 N.W.2d 556 (1999).

No. A-07-1170: **State v. Robb**. Motion of appellant to dismiss appeal sustained; appeal dismissed with prejudice.

No. A-07-1173: **State on behalf of Wisnieski v. Wisnieski**. Appeal dismissed. See, rule 7A(2); *Michael B. v. Donna M.*, 11 Neb. App. 346, 652 N.W.2d 618 (2002).

No. A-07-1175: **Thompson v. Thompson**. Appeal dismissed, and equitable elements of purge plan after finding of contempt, along with award of attorney fees, are vacated. See, rule 7A(2); *Smeal Fire Apparatus Co. v. Kreikemeier*, 271 Neb. 616, 715 N.W.2d 134 (2006); *Hammond v. Hammond*, 3 Neb. App. 536, 529 N.W.2d 542 (1995).

No. A-07-1177: **Brooks v. Lincoln Police Dept**. By order of the court, appeal dismissed for failure to file briefs.

No. A-07-1180: **State v. Ehlers**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, rule 7B(2); *State v. Thurman*, 273 Neb. 518, 730 N.W.2d 805 (2007); *State v. Decker*, 261 Neb. 382, 622 N.W.2d 903 (2001); *State v. Harrison*, 255 Neb. 990, 588 N.W.2d 556 (1999).

No. A-07-1184: **Dean v. Department of Corr. Servs**. Motion of appellant to dismiss appeal sustained; appeal dismissed with prejudice.

No. A-07-1187: **Roos v. KFS-BD, Inc**. Appeal dismissed. See, rule 7A(2); Neb. Rev. Stat. § 25-1315 (Cum. Supp. 2006).

No. A-07-1188: **Moore v. Moore**. Affirmed. See, rule 7A(1); *Washington v. Conley*, 273 Neb. 908, 734 N.W.2d 306 (2007); *In re Adoption of Kenten H.*, 272 Neb. 846, 725 N.W.2d 548 (2007); *Kramer v. Kramer*, 15 Neb. App. 518, 731 N.W.2d 615 (2007).

No. A-07-1189: **Crum v. Rothlisberger**. Stipulation allowed; appeal dismissed; each party to pay own costs.

No. A-07-1190: **Flemons v. City of Omaha**. Appeal dismissed. See, rule 7A(2); Neb. Rev. Stat. § 25-1912(1) (Cum. Supp. 2006).

No. A-07-1191: **State v. Eloge**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-07-1193: **U.S. Bank, Nat. Assn. v. Drewes**. Appeal dismissed as filed out of time. See, rule 7A(2); Neb. Rev. Stat. § 25-1931 (Cum. Supp. 2006).

No. A-07-1197: **In re Interest of J.M**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-07-1199: **State v. Bogart**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-07-1200: **State v. Bogart**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-07-1202: **State v. Skiles**. Stipulation allowed; appeal dismissed.

No. A-07-1203: **State v. Ellis**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, *State v. Segura*, 265 Neb. 903, 660 N.W.2d 512 (2003); *State v. Schneider*, 263 Neb. 318, 640 N.W.2d 8 (2002).

No. A-07-1204: **State v. Cave**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-07-1206: **Gettner v. Seaton Publishing Co**. Affirmed. See, § 2-107(A)(1); Neb. Rev. Stat. § 25-206 (Reissue 1995).

No. A-07-1210: **Citibank South Dakota v. Eisley**. Reversed.

No. A-07-1211: **State v. Erb**. Motion of appellee for summary affirmance sustained; judgment affirmed. See *State v. Segura*, 265 Neb. 903, 660 N.W.2d 512 (2003).

No. A-07-1212: **State v. Greene**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-07-1213: **State v. Witherspoon**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-07-1214: **Woods v. Department of Corr. Servs**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-07-1215: **Michel v. Dimitroff**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-07-1218: **Evers v. Bayer**. Affirmed. See, rule 7B(2); *In re Estate of Baer*, 273 Neb. 969, 735 N.W.2d 394 (2007); *State ex rel. Medlin v. Little*, 270 Neb. 414, 703 N.W.2d 593 (2005); *In re Petition of Navrkal*, 270 Neb. 391, 703 N.W.2d 247 (2005).

No. A-07-1219: **State v. Shreve**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-07-1224: **State v. Maher**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-07-1225: **Bamford v. Swanson**. Appeal dismissed. See, rule 7A(2); *Goodman v. City of Omaha*, 274 Neb. 539, 742 N.W.2d 26 (2007).

No. A-07-1227: **State v. Titsworth**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-07-1228: **State v. Nichols**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-07-1232: **In re Estate of Ross**. Appeal dismissed. See, rule 7A(2); *Custom Fabricators v. Lenarduzzi*, 259 Neb. 453, 610 N.W.2d 391 (2000).

Nos. A-07-1233, A-07-1234: **State v. Turco**. Motions of appellee for summary affirmance sustained; judgments affirmed. See rule 7B(2).

No. A-07-1237: **Savage v. Savage**. Appeal dismissed. See, rule 7A(2); Neb. Rev. Stat. § 25-1912(3) (Cum. Supp. 2006). See, also, *State v. Blair*, 14 Neb. App. 190, 707 N.W.2d 8 (2005).

No. A-07-1238: **Berry v. Berry**. Affirmed. See, rule 7A(1); *Simpson v. Simpson*, 275 Neb. 152, 744 N.W.2d 710 (2008); *Millatmal v. Millatmal*, 272 Neb. 452, 723 N.W.2d 79 (2006).

No. A-07-1241: **State v. Baltimore**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-07-1242: **State ex rel. Tyler v. Omaha Chief of Police**. Appeal dismissed. See rule 7A(2).

No. A-07-1246: **Anderson v. Neth**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-07-1250: **Villarreal v. Galvin**. By order of the court, appeal dismissed for failure to file briefs.

No. A-07-1253: **State v. Burr**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, § 2-107(B)(2); *State v. Thomas*, 268 Neb. 570, 685 N.W.2d 69 (2004).

No. A-07-1254: **State v. Decoteau**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, rule 7B(2); *State v. Burkhardt*, 258 Neb. 1050, 607 N.W.2d 512 (2000); *State v. Drinkwalter*, 14 Neb. App. 944, 720 N.W.2d 415 (2006).

No. A-07-1255: **Guerrero v. Guerrero**. Appeal dismissed as moot.

No. A-07-1256: **State v. Richardson**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-07-1257: **State v. Banks**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-07-1258: **In re Interest of Giovani H**. Motion of appellant to dismiss appeal considered; appeal dismissed.

Nos. A-07-1265, A-07-1266: **State v. Arnold**. Motions of appellee for summary affirmance sustained; judgments affirmed. See rule 7B(2).

No. A-07-1267: **Onuachi v. Meylan Enters**. Appeal dismissed. See rule 7A(2).

No. A-07-1268: **In re Interest of Kimberly B**. By order of the court, appeal dismissed for failure to file briefs.

No. A-07-1269: **Thompson v. Thompson**. Appeal dismissed, and equitable elements of purge plan after finding of contempt, along with award of attorney fees, are vacated. See, rule 7A(2); *Smeal Fire Apparatus Co. v. Kreikemeier*, 271 Neb. 616, 715 N.W.2d 134 (2006); *Hammond v. Hammond*, 3 Neb. App. 536, 529 N.W.2d 542 (1995).

No. A-07-1272: **Drucker v. Hansen**. By order of the court, appeal dismissed for failure to file briefs.

No. A-07-1273: **Recic v. Baker**. Appeal dismissed. See, rule 7A(2); Neb. Rev. Stat. § 25-1912(3) (Cum. Supp. 2006); *Detmer v. Bixler*, 10 Neb. App. 899, 642 N.W.2d 170 (2002).

No. A-07-1274: **Harmon v. Irby Constr. Co**. Appeal dismissed. See, rule 7A(2); Neb. Rev. Stat. § 25-1902 (Reissue 1995).

No. A-07-1276: **Dodge Ed. Assn. v. Dodge Cty. Sch. Dist. No. 27-0046**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-07-1277: **Davis v. Department of Corr. Servs**. By order of the court, appeal dismissed for failure to file briefs.

No. A-07-1278: **State v. Kafele**. Motion of appellee for summary affirmance sustained. See *State v. Segura*, 265 Neb. 903, 660 N.W.2d 512 (2003).

No. A-07-1280: **State v. Jones**. Motion of appellee for summary affirmance sustained; judgment affirmed. See *State v. Segura*, 265 Neb. 903, 660 N.W.2d 512 (2003).

No. A-07-1284: **Staska v. Staska**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

Nos. A-07-1286, A-07-1287: **State v. Leeds**. Motions of appellee for summary affirmance sustained; judgments affirmed. See rule 7B(2).

No. A-07-1293: **State v. Thomas**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-07-1294: **State v. Hubbard**. Appeal dismissed. See, rule 7A(2); Neb. Rev. Stat. § 25-1902 (Reissue 1995).

No. A-07-1296: **In re Interest of Ethan M**. Motion of appellees for summary affirmance sustained; judgment affirmed. See, rules 7B(2) and 9D(1)(e); *City of Gordon v. Montana Feeders, Corp*., 273 Neb. 402, 730 N.W.2d 387 (2007); *Community Redev. Auth. v. Gizinski*, 16 Neb. App. 504, 745 N.W.2d 616 (2008).

No. A-07-1298: **State v. Cradick**. Motion of appellee for summary dismissal sustained; appeal dismissed. See rule 7B(1).

No. A-07-1299: **Lanik-Sannicks v. Sannicks**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-07-1302: **In re Interest of Tanner M. et al**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-07-1303: **In re Interest of Freyana D**. Appeal dismissed. See, rule 7A(2); *In re Interest of Sarah K.*, 258 Neb. 52, 601 N.W.2d 780 (1999).

No. A-07-1304: **In re Interest of Mariah D**. Appeal dismissed. See, rule 7A(2); *In re Interest of Sarah K.*, 258 Neb. 52, 601 N.W.2d 780 (1999).

No. A-07-1305: **Drackely v. Neth**. Order of district court reversed. See, § 2-107(A)(3); *Moyer v. Nebraska Dept. of Motor Vehicles*, 275 Neb. 688, 747 N.W.2d 924 (2008).

No. A-07-1309: **State v. Rice**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, rule 7B(2); *State v. Hessler*, 274 Neb. 478, 741 N.W.2d 406 (2007); *State v. Barfield*, 272 Neb. 502, 723 N.W.2d 303 (2006); *State v. Jacob*, 253 Neb. 950, 574 N.W.2d 117 (1998); *State v. McKee*, 253 Neb. 100, 568 N.W.2d 559 (1997).

No. A-07-1310: **State v. Pirruccello**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, rule 7B(2); *State v. Thurman*, 273 Neb. 518, 730 N.W.2d 805 (2007); *State v. Decker*, 261 Neb. 382, 622 N.W.2d 903 (2001); *State v. Harrison*, 255 Neb. 990, 588 N.W.2d 556 (1999).

No. A-07-1315: **State v. Garcia**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-07-1318: **State v. Little Spotted Horse**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, rule 7B(2); *State v. Thurman*, 273 Neb. 518, 730 N.W.2d 805 (2007); *State v. Decker*, 261 Neb. 382, 622 N.W.2d 903 (2001); *State v. Harrison*, 255 Neb. 990, 588 N.W.2d 556 (1999).

No. A-07-1319: **Employers Mut. Cas. Co. v. Smith & Chambers**. Stipulation allowed; appeal dismissed with prejudice; each party to pay own costs.

No. A-07-1321: **State v. Uecker**. By order of the court, appeal dismissed for failure to file briefs.

No. A-07-1323: **State v. Klco**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-07-1325: **In re Interest of Kendra B**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-07-1326: **State v. Westover**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-07-1329: **Exchange Bank v. Fletcher**. By order of the court, appeal dismissed for failure to file briefs.

No. A-07-1330: **State v. Swan**. Sentence summarily affirmed. See rule 7A(1).

No. A-07-1331: **State v. Petersen**. Appeal dismissed. See, rule 7A(2); Neb. Rev. Stat. § 25-1912(1) (Cum. Supp. 2006).

No. A-07-1333: **State v. Wiese**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-07-1334: **State v. Stevens**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-07-1339: **County of Sarpy v. City of Papillion**. Appeal dismissed. See, rule 7A(2); Neb. Rev. Stat. § 25-1315(1) (Cum. Supp. 2006).

No. A-07-1341: **In re Interest of Elijah A**. Stipulation allowed; appeal dismissed.

No. A-07-1342: **In re Interest of Sylvia T**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-07-1343: **In re Interest of Sierra A**. Affirmed. See rules 7A(1) and 1B(1)(b).

No. A-07-1344: **In re Interest of Joanna A**. Affirmed. See rules 7A(1) and 1B(1)(b).

No. A-07-1345: **In re Interest of Sabrina A**. Affirmed. See rules 7A(1) and 1B(1)(b).

No. A-07-1347: **State v. Bush**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, rule 7B(2); *State v. Thurman*, 273 Neb. 518, 730 N.W.2d 805 (2007); *State v. Decker*, 261 Neb. 382, 622 N.W.2d 903 (2001); *State v. Harrison*, 255 Neb. 990, 588 N.W.2d 556 (1999).

No. A-07-1348: **State v. Ochoa**. Motion of appellee for summary affirmance sustained; judgment affirmed.

No. A-07-1349: **State v. Sears**. By order of the court, appeal dismissed for failure to file briefs.

No. A-07-1350: **Wilkins v. Bergstrom**. Appeal dismissed. See, rule 7A(2); Neb. Rev. Stat. § 25-1315(1) (Cum. Supp. 2006).

No. A-07-1354: **State v. Clinkenbeard**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-07-1355: **State v. Boerschig**. Appeal dismissed. See, rule 7A(2); *State v. Haase*, 247 Neb. 817, 530 N.W.2d 617 (1995).

No. A-07-1357: **McTaggart v. Walsh**. By order of the court, appeal dismissed for failure to file briefs.

No. A-07-1358: **State v. Riege**. Stipulation allowed; appeal dismissed.

No. A-07-1359: **State v. Riege**. Stipulation allowed; appeal dismissed.

No. A-07-1366: **In re Interest of Danielle H**. Appeal dismissed. See, rule 7A(2); *In re Guardianship of Rebecca B. et al.*, 260 Neb. 922, 621 N.W.2d 289 (2000).

No. A-07-1367: **State v. Solis**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, rule 7B(2); *State v. Thurman*, 273 Neb. 518, 730 N.W.2d 805 (2007); *State v. Decker*, 261 Neb. 382, 622 N.W.2d 903 (2001); *State v. Harrison*, 255 Neb. 990, 588 N.W.2d 556 (1999).

No. A-07-1368: **State v. Forney**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, *State v. Jones*, 274 Neb. 271, 739 N.W.2d 193 (2007); *State v. Segura*, 265 Neb. 903, 660 N.W.2d 512 (2003).

No. A-07-1373: **Ahrens v. Neth**. Motion of appellant to dismiss appeal sustained; appeal dismissed at cost of appellant.

No. A-07-1375: **State v. Sell**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-08-006: **Rigatuso v. Plambeck-Rigatuso**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-08-008: **Harris v. Harris**. Appeal dismissed. See, rule 7A(2); Neb. Rev. Stat. § 25-1315 (Cum. Supp. 2006).

No. A-08-009: **State v. Rash**. Appeal dismissed. See, rule 7A(2); Neb. Rev. Stat. § 25-1912(1) (Cum. Supp. 2006).

No. A-08-010: **State v. Blessing**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-08-011: **State v. Baldwin**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-08-013: **Capital One Bank v. Whitney**. Appeal dismissed. See, rule 7A(2); Neb. Rev. Stat § 25-1912(1) (Cum. Supp. 2006).

No. A-08-014: **Preister v. Robert's Pool & Spa**. Appeal dismissed. See rule 7A(2).

No. A-08-016: **State ex rel. Tyler v. Douglas Cty. Corr. Ctr**. By order of the court, appeal dismissed for failure to file briefs.

No. A-08-017: **Villarreal v. Ferraguti**. Affirmed. See, rule 7A(1); *Aon Consulting v. Midlands Fin. Benefits*, 275 Neb. 642, 748 N.W.2d 626 (2008).

No. A-08-019: **State v. Johnston**. Motion of appellee for summary affirmance sustained; judgment affirmed. See § 2-107(B)(2).

No. A-08-020: **State v. Hiatt-King**. Affirmed. See, rule 7A(1); *State v. Ramirez*, 274 Neb. 873, 745 N.W.2d 214 (2008); *State v. Tyma*, 264 Neb. 712, 651 N.W.2d 582 (2002); *State v. Carlson*, 260 Neb. 815, 619 N.W.2d 832 (2000); *State v. Sanders*, 15 Neb. App. 554, 733 N.W.2d 197 (2007).

No. A-08-022: **State v. Kelley**. Appeal dismissed. See, rule 7A(2); Neb. Rev. Stat. §§ 29-1816 (Reissue 1995) and 43-261 (Reissue 2004).

No. A-08-022: **State v. Kelley**. Motion of appellant for rehearing sustained. Appeal reinstated.

No. A-08-024: **State v. Pacha**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-08-028: **State v. Howell**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-08-029: **State v. Lempka**. Motion of appellee for summary affirmance sustained; judgment affirmed. See § 2-107(B)(2).

No. A-08-030: **State v. Weich**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-08-031: **State v. Howard**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, rule 7B(2); *State v. Thurman*, 273 Neb. 518, 730 N.W.2d 805 (2007); *State v. Decker*, 261 Neb. 382, 622 N.W.2d 903 (2001); *State v. Harrison*, 255 Neb. 990, 588 N.W.2d 556 (1999).

No. A-08-033: **State v. Refior**. Motion of appellee for summary affirmance sustained. See §§ 2-107(B)(2) and 6-1452(A)(7).

No. A-08-034: **State v. Schaefer**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, rule 7B(2); *State v. Thomas*, 268 Neb. 570, 685 N.W.2d 69 (2004); *State v. Tonge*, 217 Neb. 747, 350 N.W.2d 571 (1984).

No. A-08-043: **State v. Bertrand**. Motion of appellee for summary affirmance sustained; judgment affirmed. See § 2-107(B)(2).

No. A-08-046: **Bush v. Lancaster Cty. Jail**. Appeal dismissed as moot. See rule 7A(2).

No. A-08-053: **Tyler v. "Glaze"**. Affirmed. See, § 2-107(A)(1); *Poppe v. Siefker*, 274 Neb. 1, 735 N.W.2d 784 (2007).

No. A-08-054: **Galvan v. Galvan**. Appeal dismissed. See rule 7A(2).

No. A-08-055: **State v. Codr**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, rule 7B(2); *State v. Reid*, 274 Neb. 780, 743 N.W.2d 370 (2008); *State v. Thurman*, 273 Neb. 518, 730 N.W.2d 805 (2007); *State v. Decker*, 261 Neb. 382, 622 N.W.2d 903 (2001); *State v. Harrison*, 255 Neb. 990, 588 N.W.2d 556 (1999).

No. A-08-056: **State v. Gleason**. By order of the court, appeal dismissed for failure to file briefs.

No. A-08-058: **State v. Gordon**. Reversed and remanded with directions.

No. A-08-060: **Hawks v. Collicott**. Appeal dismissed. See, rule 7A(2); Neb. Rev. Stat. § 25-1912(1) (Cum. Supp. 2006).

No. A-08-061: **Davis v. Department of Corr. Servs**. By order of the court, appeal dismissed for failure to file briefs.

No. A-08-064: **Eisert v. Neth**. Motion of appellant to dismiss appeal sustained; appeal dismissed at cost of appellant.

No. A-08-065: **In re Interest of Monty S**. Stipulation allowed; appeal dismissed.

No. A-08-066: **In re Interest of Jeremiah V**. Appeal dismissed. See, rule 7A(2); Neb. Rev. Stat. § 25-1912(1) (Cum. Supp. 2006).

No. A-08-067: **State v. Williams**. Motion of appellee for summary dismissal sustained; appeal dismissed. See, § 2-107(B)(1); *State v. Loyd*, 269 Neb. 762, 696 N.W.2d 860 (2005); *State v. Rubio*, 261 Neb. 475, 623 N.W.2d 659 (2001); *State v. Bostwick*, 222 Neb. 631, 385 N.W.2d 906 (1986).

No. A-08-068: **State v. Hillard**. Appeal dismissed. See rule 7A(2).

No. A-08-070: **State v. McCormick**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, § 2-107(B)(2); *State v. Reid*, 274 Neb. 780, 743 N.W.2d 370 (2008); *State v. Thurman*, 273 Neb. 518, 730 N.W.2d 805 (2007); *State v. Decker*, 261 Neb. 382, 622 N.W.2d 903 (2001); *State v. Harrison*, 255 Neb. 990, 588 N.W.2d 556 (1999).

No. A-08-072: **Zymola v. Department of Motor Vehicles**. By order of the court, appeal dismissed for failure to file briefs.

No. A-08-075: **State v. Poore**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-08-077: **State v. Hudson**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, rule 7B(2); *State v. Segura*, 265 Neb. 903, 660 N.W.2d 512 (2003).

No. A-08-079: **State v. Wolff**. By order of the court, appeal dismissed for failure to file briefs.

No. A-08-080: **State v. Johnson**. By order of the court, appeal dismissed for failure to file briefs.

No. A-08-081: **State v. Lacz**. Conviction and sentence affirmed. See § 2-107(B)(2).

No. A-08-084: **Heckman v. Neth**. Motion of appellant to dismiss appeal sustained; appeal dismissed at cost of appellant.

No. A-08-085: **SFI Ltd. Partnership 8 v. Sarpy Cty. Bd. of Equal**. Appeal dismissed. See, rule 7A(2); Neb. Rev. Stat. § 77-5019(2)(a) (Cum. Supp. 2006).

No. A-08-086: **SFI Ltd. Partnership V v. Sarpy Cty. Bd. of Equal**. Appeal dismissed. See, rule 7A(2); Neb. Rev. Stat. § 77-5019(2)(a) (Cum. Supp. 2006).

No. A-08-087: **SFI Ltd. Partnership II v. Sarpy Cty. Bd. of Equal**. Appeal dismissed. See, rule 7A(2); Neb. Rev. Stat. § 77-5019(2)(a) (Cum. Supp. 2006).

No. A-08-088: **SFI Ltd. Partnership 8 v. Sarpy Cty. Bd. of Equal**. Appeal dismissed. See, rule 7A(2); Neb. Rev. Stat. § 77-5019(2)(a) (Cum. Supp. 2006).

No. A-08-090: **State v. Delgado**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-08-091: **State v. Church**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-08-092: **State v. Kamphaus**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-08-094: **In re Interest of Mikayla L**. Appeal dismissed. See, rule 7A(2); Neb. Rev. Stat. § 25-1912(1) (Cum. Supp. 2006).

No. A-08-096: **Elliott v. Department of Motor Vehicles**. Motion of appellee for summary affirmance sustained; judgment affirmed. See § 2-107(B)(2).

No. A-08-097: **Whelan v. Whelan**. Stipulation allowed; appeal dismissed at cost of appellant.

No. A-08-099: **State v. Nicholson**. Motion of appellee for summary affirmance sustained; judgment affirmed. See § 2-107(B)(2).

No. A-08-101: **Davis v. Department of Corr. Servs**. By order of the court, appeal dismissed for failure to file briefs.

No. A-08-105: **State v. Townsend**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-08-106: **Tyler v. Omaha Fire Dept**. By order of the court, appeal dismissed for failure to file briefs.

No. A-08-107: **Countrywide Home Loans v. Allender**. Motion of appellee for summary affirmance sustained; judgment affirmed. See § 2-107(B)(2).

No. A-08-111: **State v. Alvarado**. Appeal dismissed. See, rule 7A(2); Neb. Rev. Stat. § 25-1912 (Cum. Supp. 2006); *State v. Haase*, 247 Neb. 817, 530 N.W.2d 617 (1995).

No. A-08-112: **State v. Richtarik**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, rule 7B(2); *State v. Thurman*, 273 Neb. 518, 730 N.W.2d 805 (2007); *State v. Decker*, 261 Neb. 382, 622 N.W.2d 903 (2001); *State v. Harrison*, 255 Neb. 990, 588 N.W.2d 556 (1999).

No. A-08-114: **Hedrick v. City of Waverly**. Appeal dismissed. See rule 7A(2).

No. A-08-114: **Hedrick v. City of Waverly**. Motion of appellant for rehearing sustained. Appeal reinstated. See *SID No. 1 v. Nebraska Pub. Power Dist.*, 253 Neb. 917, 573 N.W.2d 460 (1998).

No. A-08-114: **Hedrick v. City of Waverly**. Stipulation considered; appeal dismissed; each party to pay own costs.

No. A-08-117: **In re Interest of Pedro M**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-08-120: **In re Interest of Deprece A. & Latysha A**. Appeal dismissed. See, rule 7A(2); *In re Interest of Sarah K.*, 258 Neb. 52, 601 N.W.2d 780 (1999).

No. A-08-125: **Motley v. Motley**. Affirmed. See rule 7A(1).

No. A-08-127: **State v. Campbell**. Motion of appellant to dismiss appeal considered; appeal dismissed.

No. A-08-129: **State v. Grixby**. Motion of appellee for summary affirmance sustained; judgment affirmed. See § 2-107(B)(2).

No. A-08-132: **Hasley v. City of Beatrice**. Appeal dismissed. See, rule 7A(2); Neb. Rev. Stat. § 25-1315(1) (Cum. Supp. 2006).

No. A-08-134: **Hillyer v. Estate of Lienemann**. Appeal dismissed. See, rule 7A(2); Neb. Rev. Stat. §§ 30-1601(1) and 25-1912 (Cum. Supp. 2006).

No. A-08-136: **State v. Davis**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-08-138: **Bernice Zimmerman Trust v. Henry**. Appeal dismissed. See, rule 7A(2); *Cerny v. Longley*, 266 Neb. 26, 661 N.W.2d 696 (2003). See, also, Neb. Rev. Stat. § 25-1902 (Reissue 1995).

No. A-08-143: **State v. Allen**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-08-144: **State v. Perdew**. Motion of appellee for summary affirmance sustained; judgment affirmed. See *State v. Segura*, 265 Neb. 903, 660 N.W.2d 512 (2003).

No. A-08-145: **Davis v. Sears**. By order of the court, appeal dismissed for failure to file briefs.

No. A-08-150: **State v. Mister**. Appeal dismissed.

No. A-08-152: **State v. Sweetser**. Appeal dismissed. See, rule 7A(2); Neb. Rev. Stat. § 25-1912(1) (Cum. Supp. 2006).

No. A-08-153: **Swanson v. Neth**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-08-158: **State v. Ellington**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-08-162: **In re Guardianship of Lola W**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-08-163: **City of Hastings v. Employers Mut. Cas. Co**. Appeal dismissed. See, rule 7A(2); Neb. Rev. Stat. § 25-1315(1) (Cum. Supp. 2006); *Malolepszy v. State*, 270 Neb. 100, 699 N.W.2d 387 (2005).

No. A-08-164: **Worman v. Department of Motor Vehicles**. Motion of appellant to dismiss appeal sustained; appeal dismissed with prejudice.

No. A-08-170: **State v. Logan**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, § 2-107(B)(2); *State v. Segura*, 265 Neb. 903, 660 N.W.2d 512 (2003).

No. A-08-171: **De Garay v. Roca**. Motion of appellant to dismiss appeal considered; appeal dismissed at cost of appellant.

No. A-08-177: **State v. Thomas**. Appeal dismissed. See rule 7A(2).

Nos. A-08-180, A-08-181: **State v. Booth**. Stipulations and suggestions for remand for further proceedings sustained.

No. A-08-185: **Kreutzer v. Neth**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-08-186: **Brooks v. Brooks**. Appeal dismissed. See, rule 7A(2); *State v. Haase*, 247 Neb. 817, 530 N.W.2d 617 (1995).

No. A-08-187: **Reier on behalf of Schultz v. Millard Pub. Sch. Dist**. Appeal dismissed. See, rule 7A(2); Neb. Rev. Stat. § 79-289 (Reissue 2003).

No. A-08-189: **Zealand v. Zealand**. Appeal dismissed. See, rule 7A(2); *Cerny v. Longley*, 266 Neb. 26, 661 N.W.2d 696 (2003).

No. A-08-190: **State v. Bush**. Appeal dismissed. See, rule 7A(2); *State v. Engleman*, 5 Neb. App. 485, 560 N.W.2d 851 (1997).

No. A-08-191: **Green Tree Servicing v. Lemp**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-08-195: **State v. Samsula**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-08-201: **Roberts v. Harp**. Appeal dismissed. See, rule 7A(2); Neb. Rev. Stat. § 25-1912(1) (Cum. Supp. 2006). See, also, *Klein v. Klein*, 230 Neb. 385, 431 N.W.2d 646 (1988).

No. A-08-204: **Wiese v. Gragg**. Appeal dismissed. See, rule 7A(2); Neb. Rev. Stat. § 25-1912 (Cum. Supp. 2006).

No. A-08-207: **Ivory v. Krump**. Appeal dismissed. See, rule 7A(2); Neb. Rev. Stat. § 25-1912(3) (Cum. Supp. 2006).

Nos. A-08-208, A-08-209: **State v. Wortham**. Motions of appellee for summary affirmance sustained; judgments affirmed. See, rule 7B(2); *State v. Thurman*, 273 Neb. 518, 730 N.W.2d 805 (2007); *State v. Decker*, 261 Neb. 382, 622 N.W.2d 903 (2001); *State v. Harrison*, 255 Neb. 990, 588 N.W.2d 556 (1999).

No. A-08-214: **State v. Retman**. Motion of appellee for summary affirmance sustained; judgment affirmed. See § 2-107(B)(2).

No. A-08-216: **Hustig v. Physicians Clinic**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-08-217: **Schmader v. Riesberg**. Appeal dismissed. See, rule 7A(2); Neb. Rev. Stat. § 25-1912 (Cum. Supp. 2006); *State v. Bellamy*, 264 Neb. 784, 652 N.W.2d 86 (2002).

No. A-08-218: **Schmader v. Riesberg**. Appeal dismissed. See, rule 7A(2); Neb. Rev. Stat. § 25-1912 (Cum. Supp. 2006); *State v. Bellamy*, 264 Neb. 784, 652 N.W.2d 86 (2002).

No. A-08-219: **Wise v. Whitted**. Stipulation allowed; appeal dismissed.

No. A-08-222: **Tyler on behalf of Tyler v. Nightengale**. Appeal dismissed. See rule 7A(2).

No. A-08-223: **Tyler v. Roe**. Reversed.

No. A-08-224: **Tyler v. Pat R**. By order of the court, appeal dismissed for failure to file briefs.

No. A-08-225: **Davis v. Davis**. Appeal dismissed. See, rule 7A(2); *State v. Haase*, 247 Neb. 817, 530 N.W.2d 617 (1995).

No. A-08-228: **Lahners v. Lahners**. Stipulation allowed; appeal dismissed; each party to pay own costs.

No. A-08-229: **State v. Hernandez**. Appeal dismissed. See, rule 7A(2); Neb. Rev. Stat. § 25-1912 (Cum. Supp. 2006).

No. A-08-230: **Haug v. Neth**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-08-231: **Rodriguez v. Rodriguez**. Appeal dismissed. See, rule 7A(2); Neb. Rev. Stat. § 25-1912 (Cum. Supp. 2006).

No. A-08-234: **Blake v. Hessler**. Appeal dismissed. See, rule 7A(2); Neb. Rev. Stat. § 25-1315 (Cum. Supp. 2006).

No. A-08-235: **Hermsen v. Ellison**. Stipulation to dismiss appeal sustained; appeal dismissed with prejudice; each party to pay own costs.

No. A-08-236: **Smith v. Board of Regents**. Appeal dismissed. See, rule 7A(2); Neb. Rev. Stat. § 25-1315 (Cum. Supp. 2006); *Cerny v. Todco Barricade Co.*, 273 Neb. 800, 733 N.W.2d 877 (2007).

No. A-08-237: **Benson v. Benson**. By order of the court, appeal dismissed for failure to file briefs.

No. A-08-238: **State v. Sellers**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-08-239: **State v. Dinh**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, § 2-107(B)(2); *State v. Segura*, 265 Neb. 903, 660 N.W.2d 512 (2003).

No. A-08-246: **Lake Swanson Country Estates v. Hawks**. Appeal dismissed. See, rule 7A(2); Neb. Rev. Stat. § 25-1912 (Cum. Supp. 2006).

No. A-08-250: **State v. Smith**. Appeal dismissed. See, rule 7A(2); Neb. Rev. Stat. § 25-2301.02 (Cum. Supp. 2006).

No. A-08-251: **State v. Smith**. Appeal dismissed. See, rule 7A(2); Neb. Rev. Stat. § 25-2301.02 (Cum. Supp. 2006).

No. A-08-253: **State v. Siefker**. Appeal dismissed. See, rule 7A(2); Neb. Rev. Stat. § 25-1912(1) (Cum. Supp. 2006).

No. A-08-254: **Shelby v. Lacey**. Appeal dismissed. See, rule 7A(2); Neb. Rev. Stat. §§ 25-1912 and 25-1329 (Cum. Supp. 2006).

No. A-08-255: **In re Guardianship & Conservatorship of Ellen W**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-08-255: **In re Guardianship & Conservatorship of Ellen W**. Motion of appellant for rehearing sustained. Appeal reinstated.

No. A-08-256: **State v. Shaw**. Motion of appellee for summary affirmance sustained; judgment affirmed. See § 2-107(B)(2).

No. A-08-257: **State v. Ebert**. Motion of appellee for summary affirmance sustained; judgment affirmed. See § 2-107(B)(2).

No. A-08-258: **State v. Ebert**. Motion of appellee for summary affirmance sustained; judgment affirmed. See § 2-107(B)(2).

No. A-08-259: **Davis v. Crosby**. By order of the court, appeal dismissed for failure to file briefs.

No. A-08-263: **State v. Vanderbeek**. By order of the court, appeal dismissed for failure to file briefs.

No. A-08-265: **State v. Owen**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-08-268: **State v. May**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-08-269: **Bondegard v. Department of Motor Vehicles**. Motion of appellant to dismiss appeal sustained; appeal dismissed with prejudice.

No. A-08-273: **Keating v. State**. Appeal dismissed. See, rule 7A(2); *Goodman v. City of Omaha*, 274 Neb. 539, 742 N.W.2d 26 (2007).

No. A-08-277: **Jacob v. Department of Corr. Servs**. Appeal dismissed. See, rule 7A(2); Neb. Rev. Stat. § 84-901(3) (Reissue 1999); *Kerr v. Board of Regents*, 15 Neb. App. 907, 739 N.W.2d 224 (2007).

No. A-08-284: **Hadrick v. Hadrick**. By order of the court, appeal dismissed for failure to file briefs.

No. A-08-285: **State v. Maas**. Appeal dismissed. See, rule 7A(2); *State v. Haase*, 247 Neb. 817, 530 N.W.2d 617 (1995).

No. A-08-288: **Ebersbacher v. Bunge North America**. Affirmed. See, rule 7A(1); *Olivotto v. DeMarco Bros. Co.*, 273 Neb. 672, 732 N.W.2d 354 (2007); *Mendoza v. Omaha Meat Processors*, 225 Neb. 771, 408 N.W.2d 280 (1987).

No. A-08-289: **State v. Shackleford**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, § 2-107(B)(2); *State v. Reid*, 274 Neb. 780, 743 N.W.2d 370 (2008); *State v. Thurman*, 273 Neb. 518, 730 N.W.2d 805 (2007); *State v. Decker*, 261 Neb. 382, 622 N.W.2d 903 (2001); *State v. Harrison,* 255 Neb. 990, 588 N.W.2d 556 (1999).

No. A-08-291: **State v. Mefford**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, § 2-107(B)(2); Neb. Rev. Stat. § 29-2266(2) (Cum. Supp. 2006); *State v. Kinkennon*, 275 Neb. 570, 747 N.W.2d 437 (2008); *State v. Mastne*, 15 Neb. App. 280, 725 N.W.2d 862 (2006).

No. A-08-297: **Waldron v. Wolfe**. Appeal dismissed. See, rule 7A(2); Neb. Rev. Stat. § 25-1315 (Cum. Supp. 2006); *Malolepszy v. State*, 270 Neb. 100, 699 N.W.2d 387 (2005).

Nos. A-08-299, A-08-300: **State v. Saltzman**. Motions of appellee for summary affirmance sustained; judgments affirmed. See § 2-107(B)(2).

No. A-08-301: **Ross v. Board of Parole**. Appeal dismissed. See, rule 7A(2); *State v. Stuart*, 12 Neb. App. 283, 671 N.W.2d 239 (2003).

No. A-08-302: **First v. Department of Motor Vehicles**. By order of the court, appeal dismissed for failure to file briefs.

No. A-08-305: **State v. Reyes-Carranza**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-08-307: **Heyne v. Heyne**. Appeal dismissed. See, rule 7A(2); *Jessen v. Jessen*, 259 Neb. 644, 611 N.W.2d 834 (2000).

No. A-08-309: **State ex rel. Goodwin v. Heineman**. Appeal dismissed. See rule 7A(2).

No. A-08-310: **State v. Burt**. Motion of appellee for summary affirmance sustained; judgment affirmed. See § 2-107(B)(2).

Nos. A-08-311, A-08-312: **State v. Davis**. Motions of appellee for summary affirmance sustained; judgments affirmed. See § 2-107(B)(2).

Nos. A-08-313, A-08-314: **State v. Breazeale**. Motions of appellee for summary affirmance sustained; judgments affirmed. See § 2-107(B)(2).

No. A-08-317: **Huddleston v. Neth**. By order of the court, appeal dismissed for failure to file briefs.

No. A-08-319: **State v. Sornberger**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-08-326: **State v. Silva**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-08-327: **Blaha v. Neth**. By order of the court, appeal dismissed for failure to file briefs.

No. A-08-330: **Tyler v. Tyler**. Appeal dismissed. See, rule 7A(2); Neb. Rev. Stat. § 25-1902 (Reissue 1995).

No. A-08-338: **State v. William**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, § 2-107(B)(2); *State v. Jones*, 274 Neb. 271, 739 N.W.2d 193 (2007); *State v. Archie*, 273 Neb. 612, 733 N.W.2d 513 (2007).

No. A-08-342: **Younger v. Omaha Public Schools**. Motion of appellant to dismiss appeal sustained; appeal dismissed; each party to pay own costs.

No. A-08-343: **State v. Terrell**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, § 2-107(B)(2); *State v. Reid*, 274 Neb. 780, 743 N.W.2d 370 (2008); *State v. Thurman*, 273 Neb. 518, 730 N.W.2d 805 (2007); *State v. Decker*, 261 Neb. 382, 622 N.W.2d 903 (2001); *State v. Harrison*, 255 Neb. 990, 588 N.W.2d 556 (1999).

Nos. A-08-344, A-08-375: **State v. Castanada**. Motions of appellee for summary affirmance of sentences in each case sustained.

No. A-08-346: **Horner v. Horner**. Motion of appellant pro se to dismiss appeal sustained; appeal dismissed.

No. A-08-347: **Jasper v. Jasper**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-08-350: **State ex rel. Tyler v. City of Omaha**. Appeal dismissed. See rule 7A(2).

No. A-08-354: **In re Guardianship of Elijah A**. Appeal dismissed. See rule 7A(2).

No. A-08-356: **State v. Nichols**. Motion of appellee for summary affirmance sustained; judgment affirmed. See § 2-107(B)(2).

No. A-08-358: **Davis v. Davis**. Appeal dismissed. See, rule 7A(2); Neb. Rev. Stat. § 25-1912(1) (Cum. Supp. 2006).

No. A-08-360: **State v. Collins**. Motion of appellee for summary affirmance sustained; judgment affirmed. See § 2-107(B)(2).

No. A-08-362: **Lewis v. Kazo**. Appeal dismissed. See, rule 7A(2); Neb. Rev. Stat. § 25-1912(1) (Cum. Supp. 2006).

No. A-08-365: **In re Interest of David T**. By order of the court, appeal dismissed for failure to file briefs.

No. A-08-366: **Gehring v. Koch**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-08-367: **Gehring v. Koch**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-08-368: **Tyrrell v. State Patrol**. Motion of appellee for summary dismissal sustained; appeal dismissed. See, rule 7B(1); Neb. Rev. Stat. § 25-1902 (Reissue 1995); *Williams v. Baird*, 273 Neb. 977, 735 N.W.2d 383 (2007).

No. A-08-369: **In re Interest of Lily L**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-08-376: **SBC v. Related Investment, Inc**. Appeal dismissed. See, rule 7A(2); Neb. Rev. Stat. § 25-1902 (Reissue 1995); *In re Interest of Enrique P. et al.*, 14 Neb. App. 453, 709 N.W.2d 676 (2006).

No. A-08-387: **Doolittle v. Lakewood Villages Lake Lot Owners Assn**. Appeal dismissed. See, rule 7A(2); Neb. Rev. Stat. § 25-1902 (Reissue 1995); *Poppert v. Dicke*, 275 Neb. 562, 747 N.W.2d 629 (2008).

No. A-08-390: **State v. Gillham**. By order of the court, appeal dismissed for failure to file briefs.

No. A-08-391: **State v. Garcia**. Motion of appellee for summary affirmance sustained; judgment affirmed. See § 2-107(B)(2).

No. A-08-395: **Reinke v. Reinke**. Appeal dismissed. See, rule 7A(2); *Jessen v. Jessen*, 259 Neb. 644, 611 N.W.2d 834 (2000).

No. A-08-396: **Arias v. Heineman**. Appeal dismissed.

No. A-08-400: **In re Interest of Eva J. & Shakeela J**. Appeal dismissed. See, rule 7A(2); Neb. Rev. Stat. § 25-1902 (Reissue 1995).

No. A-08-401: **State v. Calderon**. Appeal dismissed. See, rule 7A(2); *State v. Haase*, 247 Neb. 817, 530 N.W.2d 617 (1995).

No. A-08-402: **State v. Valentine**. Appeal dismissed. See rule 7A(2).

No. A-08-403: **Becker v. Becker**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-08-407: **Superior Lighting v. Omaha State Bank**. Stipulation allowed; appeal dismissed with prejudice; each party to pay own costs.

No. A-08-410: **Montin v. Gibson**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-08-415: **State v. Molnar**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-08-416: **State v. Molnar**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-08-420: **Hageman v. Hageman**. By order of the court, appeal dismissed for failure to file briefs.

No. A-08-421: **In re Interest of Vanessa D**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-08-423: **In re Interest of Destinie B. et al**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-08-424: **State v. Hill**. Appeal dismissed. See rule 7A(2).

No. A-08-427: **Wells Fargo Bank v. Midwest Environmental**. Appeal dismissed. See, § 2-107(A)(2); Neb. Rev. Stat. § 25-1902 (Reissue 1995). See, also, *Qwest Bus. Resources v. Headliners–1299 Farnam*, 15 Neb. App. 405, 727 N.W.2d 724 (2007).

No. A-08-430: **State v. Ramirez**. Appeal dismissed. See, rule 7A(2); *State v. Haase*, 247 Neb. 817, 530 N.W.2d 617 (1995).

No. A-08-440: **Brouse v. Magnuson**. Appeal dismissed. See, rule 7A(2); Neb. Rev. Stat. § 25-1902 (Reissue 1995); *Poppert v. Dicke*, 275 Neb. 562, 747 N.W.2d 629 (2008).

No. A-08-443: **Kruid v. Farm Bureau Mut. Ins. Co**. Appeal dismissed. See, rule 7A(2); Neb. Rev. Stat. § 25-1902 (Reissue 1995); *Poppert v. Dicke*, 275 Neb. 562, 747 N.W.2d 629 (2008).

No. A-08-462: **In re Interest of Madelyn E**. Stipulation allowed; appeal dismissed.

No. A-08-465: **State v. Schneider**. Appeal dismissed. See rule 7A(2).

No. A-08-467: **Lewis v. Duncan**. Appeal dismissed. See, rule 7A(2); Neb. Rev. Stat. § 25-1912(1) (Cum. Supp. 2006). See, also, Neb. Rev. Stat. § 25-1315(1) (Cum. Supp. 2006).

No. A-08-469: **State v. Storz**. Motion of appellee for summary affirmance sustained; judgment affirmed. See § 2-107(B)(2).

No. A-08-471: **Benal v. Benal**. Appeal dismissed. See, rule 7A(2); Neb. Rev. Stat. § 25-1912(1) (Cum. Supp. 2006).

No. A-08-472: **Lewis v. Cassidy**. By order of the court, appeal dismissed for failure to file replacement briefs.

No. A-08-488: **Goeden v. Goeden**. Appeal dismissed. See, rule 7A(2); Neb. Rev. Stat. § 25-1912(1) (Cum. Supp. 2006).

No. A-08-489: **Eckert v. Neth**. Appeal dismissed. See, rule 7A(2); Neb. Rev. Stat. §§ 60-498.01(6)(a) and 60-498.04 (Reissue 2004).

No. A-08-492: **Wilson v. Fieldgrove**. Appeal dismissed. See, rule 7A(2); Neb. Rev. Stat. § 25-1315(1) (Cum. Supp. 2006).

No. A-08-504: **Lewis v. Warren**. Appeal dismissed. See, rule 7A(2); Neb. Rev. Stat. § 25-1912(1) (Cum. Supp. 2006).

No. A-08-505: **State v. Calderon**. Appeal dismissed. See, rule 7A(2); *State v. Haase*, 247 Neb. 817, 530 N.W.2d 617 (1995).

No. A-08-507: **Miller v. Miller**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-08-508: **Lewis v. Dewan**. Appeal dismissed. See, rule 7A(2); Neb. Rev. Stat. § 25-1912(1) (Cum. Supp. 2006); *State v. Haase*, 247 Neb. 817, 530 N.W.2d 617 (1995).

No. A-08-535: **Lewis v. Duncan**. Appeal dismissed. See, rule 7A(2); *Martin v. McGinn*, 267 Neb. 931, 678 N.W.2d 737 (2004).

No. A-08-536: **Lewis v. Duncan**. Appeal dismissed. See, rule 7A(2); *Martin v. McGinn*, 267 Neb. 931, 678 N.W.2d 737 (2004).

No. A-08-537: **Lewis v. Duncan**. Appeal dismissed. See, rule 7A(2); *Martin v. McGinn*, 267 Neb. 931, 678 N.W.2d 737 (2004).

No. A-08-538: **Lewis v. Duncan**. Appeal dismissed. See, rule 7A(2); *Martin v. McGinn*, 267 Neb. 931, 678 N.W.2d 737 (2004).

No. A-08-539: **Lewis v. Duncan**. Appeal dismissed. See, rule 7A(2); *Martin v. McGinn*, 267 Neb. 931, 678 N.W.2d 737 (2004).

No. A-08-540: **Lewis v. Cole**. Appeal dismissed. See, rule 7A(2); *Martin v. McGinn*, 267 Neb. 931, 678 N.W.2d 737 (2004).

No. A-08-541: **Lewis v. Duncan**. Appeal dismissed. See, rule 7A(2); *Martin v. McGinn*, 267 Neb. 931, 678 N.W.2d 737 (2004).

No. A-08-542: **Lewis v. Duncan**. Appeal dismissed. See, rule 7A(2); *Martin v. McGinn*, 267 Neb. 931, 678 N.W.2d 737 (2004).

No. A-08-543: **Lewis v. Duncan**. Appeal dismissed. See, rule 7A(2); *Martin v. McGinn*, 267 Neb. 931, 678 N.W.2d 737 (2004).

No. A-08-544: **Lewis v. Wyatt**. Appeal dismissed. See, rule 7A(2); *Martin v. McGinn*, 267 Neb. 931, 678 N.W.2d 737 (2004).

No. A-08-545: **Lewis v. Brown**. Appeal dismissed. See, rule 7A(2); *Martin v. McGinn*, 267 Neb. 931, 678 N.W.2d 737 (2004).

No. A-08-546: **Lewis v. Crump**. Appeal dismissed. See, rule 7A(2); *Martin v. McGinn*, 267 Neb. 931, 678 N.W.2d 737 (2004).

No. A-08-547: **Lewis v. Wyatt**. Appeal dismissed. See, rule 7A(2); *Martin v. McGinn*, 267 Neb. 931, 678 N.W.2d 737 (2004).

No. A-08-548: **Lewis v. Faulkner**. Appeal dismissed. See, rule 7A(2); *Martin v. McGinn*, 267 Neb. 931, 678 N.W.2d 737 (2004).

No. A-08-549: **Lewis v. Foxs**. Appeal dismissed. See, rule 7A(2); *Martin v. McGinn*, 267 Neb. 931, 678 N.W.2d 737 (2004).

No. A-08-550: **Lewis v. Shelly**. Appeal dismissed. See, rule 7A(2); *Martin v. McGinn*, 267 Neb. 931, 678 N.W.2d 737 (2004).

No. A-08-551: **Lewis v. Dailey**. Appeal dismissed. See, rule 7A(2); *Martin v. McGinn*, 267 Neb. 931, 678 N.W.2d 737 (2004).

No. A-08-552: **Lewis v. Srbs**. Appeal dismissed. See, rule 7A(2); *Martin v. McGinn*, 267 Neb. 931, 678 N.W.2d 737 (2004).

No. A-08-553: **Lewis v. Frock**. Appeal dismissed. See, rule 7A(2); *Martin v. McGinn*, 267 Neb. 931, 678 N.W.2d 737 (2004).

No. A-08-554: **Lewis v. Ostermeller**. Appeal dismissed. See, rule 7A(2); *Martin v. McGinn*, 267 Neb. 931, 678 N.W.2d 737 (2004).

No. A-08-555: **Lewis v. Klien**. Appeal dismissed. See, rule 7A(2); *Martin v. McGinn*, 267 Neb. 931, 678 N.W.2d 737 (2004).

No. A-08-556: **Lewis v. Lippolds**. Appeal dismissed. See, rule 7A(2); *Martin v. McGinn*, 267 Neb. 931, 678 N.W.2d 737 (2004).

No. A-08-557: **Lewis v. Bowie**. Appeal dismissed. See, rule 7A(2); *Martin v. McGinn*, 267 Neb. 931, 678 N.W.2d 737 (2004).

No. A-08-558: **Lewis v. Echtenkamp**. Appeal dismissed. See, rule 7A(2); *Martin v. McGinn*, 267 Neb. 931, 678 N.W.2d 737 (2004).

No. A-08-559: **Lewis v. Woolman**. Appeal dismissed. See, rule 7A(2); *Martin v. McGinn*, 267 Neb. 931, 678 N.W.2d 737 (2004).

No. A-08-560: **Lewis v. Scheckelberg**. Appeal dismissed. See, rule 7A(2); *Martin v. McGinn*, 267 Neb. 931, 678 N.W.2d 737 (2004).

No. A-08-561: **Lewis v. Passo**. Appeal dismissed. See, rule 7A(2); *Martin v. McGinn*, 267 Neb. 931, 678 N.W.2d 737 (2004).

No. A-08-562: **Lewis v. Love**. Appeal dismissed. See, rule 7A(2); *Martin v. McGinn*, 267 Neb. 931, 678 N.W.2d 737 (2004).

No. A-08-563: **Lewis v. Vaccaro**. Appeal dismissed. See, rule 7A(2); *Martin v. McGinn*, 267 Neb. 931, 678 N.W.2d 737 (2004).

No. A-08-564: **Lewis v. Deignan**. Appeal dismissed. See, rule 7A(2); *Martin v. McGinn*, 267 Neb. 931, 678 N.W.2d 737 (2004).

No. A-08-565: **Lewis v. Mahonny**. Appeal dismissed. See, rule 7A(2); *Martin v. McGinn*, 267 Neb. 931, 678 N.W.2d 737 (2004).

No. A-08-566: **Lewis v. Barrios**. Appeal dismissed. See, rule 7A(2); *Martin v. McGinn*, 267 Neb. 931, 678 N.W.2d 737 (2004).

No. A-08-567: **Lewis v. Hoffman**. Appeal dismissed. See, rule 7A(2); *Martin v. McGinn*, 267 Neb. 931, 678 N.W.2d 737 (2004).

No. A-08-568: **Lewis v. Reyes**. Appeal dismissed. See, rule 7A(2); *Martin v. McGinn*, 267 Neb. 931, 678 N.W.2d 737 (2004).

No. A-08-569: **Lewis v. Huston**. Appeal dismissed. See, rule 7A(2); *Martin v. McGinn*, 267 Neb. 931, 678 N.W.2d 737 (2004).

No. A-08-589: **Johnson v. County of Loup**. Appeal dismissed. See, § 2-107(A)(2); *Koch v. Aupperle*, 274 Neb. 52, 737 N.W.2d 869 (2007).

No. A-08-592: **State v. Thorpe**. Appeal dismissed. See, rule 7A(2); Neb. Rev. Stat. § 25-1902 (Reissue 1995).

No. A-08-596: **State v. Tran**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-08-601: **Lewis v. Cheuvront**. Appeal dismissed. See, § 2-107(A)(2); Neb. Rev. Stat. § 25-1912(1) (Cum. Supp. 2006).

No. A-08-604: **Nebraska Leasing Servs. v. Child Care Mgmt. Servs**. Appeal dismissed. See, § 2-107(A)(2); Neb. Rev. Stat. § 25-1315(1) (Cum. Supp. 2006).

No. A-08-608: **State v. Schwaninger**. Stipulation allowed; appeal dismissed.

No. A-08-612: **State v. Lopez**. Appeal dismissed. See, rule 7A(2); Neb. Rev. Stat. § 25-1912(1) (Cum. Supp. 2006).

No. A-08-613: **In re Estate of Fries**. Appeal dismissed. See, rule 7A(2); *In re Estate of Rose*, 273 Neb. 490, 730 N.W.2d 391 (2007).

No. A-08-614: **In re Interest of David W**. Appeal dismissed. See, rule 7A(2); *In re Interest of Anthony R. et al.*, 264 Neb. 699, 651 N.W.2d 231 (2002).

No. A-08-616: **State v. Lewis**. Appeal dismissed. See, rule 7A(2).

No. A-08-621: **State v. Davis**. Appeal dismissed. See, § 2-107(A)(2); Neb. Rev. Stat. § 25-1912(1) (Cum. Supp. 2006).

No. A-08-627: **In re Interest of Matthew S**. Motion of appellee Matthew S. for summary dismissal sustained; appeal dismissed. See, § 2-107(B)(1); Neb. Rev. Stat. § 25-1902 (Reissue 1995); *Hallie Mgmt. Co. v. Perry*, 272 Neb. 81, 718 N.W.2d 531 (2006); *Brozovsky v. Norquest*, 231 Neb. 731, 437 N.W.2d 798 (1989).

No. A-08-643: **Lawler v. Lawler**. Appeal dismissed. See § 2-107(A)(2).

No. A-08-645: **Santo v. Santo**. Appeal dismissed. See, § 2-107(A)(2); *State v. Haase*, 247 Neb. 817, 530 N.W.2d 617 (1995).

No. A-08-659: **Tyler v. Finegan**. Appeal dismissed. See, § 2-107(A)(2); *Mumin v. Dees*, 266 Neb. 201, 663 N.W.2d 125 (2003).

No. A-08-661: **Houck v. Houck**. Motion of appellee to dismiss and appellant's joinder in motion sustained; appeal dismissed. See § 2-107(B)(1).

No. A-08-666: **Lewis v. Pecha**. Appeal dismissed. See, rule 7A(2); Neb. Rev. Stat. § 25-1912(1) (Cum. Supp. 2006).

No. A-08-667: **Lewis v. Henningson**. Appeal dismissed. See, rule 7A(2); Neb. Rev. Stat. § 25-1912(1) (Cum. Supp. 2006).

No. A-08-668: **Lewis v. Kavars**. Appeal dismissed. See, rule 7A(2); Neb. Rev. Stat. § 25-1912(1) (Cum. Supp. 2006).

No. A-08-669: **Lewis v. Charlisle**. Appeal dismissed. See, rule 7A(2); Neb. Rev. Stat. § 25-1912(1) (Cum. Supp. 2006).

No. A-08-670: **Lewis v. Starlin**. Appeal dismissed. See, rule 7A(2); Neb. Rev. Stat. § 25-1912(1) (Cum. Supp. 2006).

No. A-08-671: **Lewis v. Circo**. Appeal dismissed. See, rule 7A(2); Neb. Rev. Stat. § 25-1912(1) (Cum. Supp. 2006).

No. A-08-672: **Lewis v. Carmody**. Appeal dismissed. See, rule 7A(2); Neb. Rev. Stat. § 25-1912(1) (Cum. Supp. 2006).

No. A-08-673: **Lewis v. Behren**. Appeal dismissed. See, rule 7A(2); Neb. Rev. Stat. § 25-1912(1) (Cum. Supp. 2006).

No. A-08-674: **Lewis v. Lucero**. Appeal dismissed. See, rule 7A(2); Neb. Rev. Stat. § 25-1912(1) (Cum. Supp. 2006).

No. A-08-675: **Lewis v. Smith**. Appeal dismissed. See, rule 7A(2); Neb. Rev. Stat. § 25-1912(1) (Cum. Supp. 2006).

No. A-08-676: **Lewis v. Novotny**. Appeal dismissed. See, rule 7A(2); Neb. Rev. Stat. § 25-1912(1) (Cum. Supp. 2006).

No. A-08-677: **Lewis v. Washington**. Appeal dismissed. See, rule 7A(2); Neb. Rev. Stat. § 25-1912(1) (Cum. Supp. 2006).

No. A-08-678: **Lewis v. Grossoehang**. Appeal dismissed. See, rule 7A(2); Neb. Rev. Stat. § 25-1912(1) (Cum. Supp. 2006).

No. A-08-679: **Lewis v. Bart**. Appeal dismissed. See, rule 7A(2); Neb. Rev. Stat. § 25-1912(1) (Cum. Supp. 2006).

No. A-08-680: **Lewis v. Teply**. Appeal dismissed. See, rule 7A(2); Neb. Rev. Stat. § 25-1912(1) (Cum. Supp. 2006).

No. A-08-681: **Lewis v. Yaghotfam**. Appeal dismissed. See, rule 7A(2); Neb. Rev. Stat. § 25-1912(1) (Cum. Supp. 2006).

No. A-08-682: **Lewis v. Stranglen**. Appeal dismissed. See, rule 7A(2); Neb. Rev. Stat. § 25-1912(1) (Cum. Supp. 2006).

No. A-08-683: **Lewis v. Shada**. Appeal dismissed. See, rule 7A(2); Neb. Rev. Stat. § 25-1912(1) (Cum. Supp. 2006).

No. A-08-684: **Lewis v. Bart**. Appeal dismissed. See, rule 7A(2); Neb. Rev. Stat. § 25-1912(1) (Cum. Supp. 2006).

No. A-08-685: **Lewis v. Butler**. Appeal dismissed. See, rule 7A(2); Neb. Rev. Stat. § 25-1912(1) (Cum. Supp. 2006).

No. A-08-686: **Lewis v. Brunning**. Appeal dismissed. See, rule 7A(2); Neb. Rev. Stat. § 25-1912(1) (Cum. Supp. 2006).

No. A-08-687: **Lewis v. Rummel**. Appeal dismissed. See, rule 7A(2); Neb. Rev. Stat. § 25-1912(1) (Cum. Supp. 2006).

No. A-08-688: **Lewis v. Love**. Appeal dismissed. See, rule 7A(2); Neb. Rev. Stat. § 25-1912(1) (Cum. Supp. 2006).

No. A-08-689: **Lewis v. Barnes**. Appeal dismissed. See, rule 7A(2); Neb. Rev. Stat. § 25-1912(1) (Cum. Supp. 2006).

No. A-08-690: **Lewis v. Osier**. Appeal dismissed. See, rule 7A(2); Neb. Rev. Stat. § 25-1912(1) (Cum. Supp. 2006).

No. A-08-691: **Lewis v. Gaskell**. Appeal dismissed. See, rule 7A(2); Neb. Rev. Stat. § 25-1912(1) (Cum. Supp. 2006).

No. A-08-692: **Lewis v. Herout**. Appeal dismissed. See, rule 7A(2); Neb. Rev. Stat. § 25-1912(1) (Cum. Supp. 2006).

No. A-08-693: **Lewis v. Friend**. Appeal dismissed. See, rule 7A(2); Neb. Rev. Stat. § 25-1912(1) (Cum. Supp. 2006).

No. A-08-694: **Lewis v. Vaccaro**. Appeal dismissed. See, rule 7A(2); Neb. Rev. Stat. § 25-1912(1) (Cum. Supp. 2006).

No. A-08-695: **Lewis v. Tonsoni**. Appeal dismissed. See, rule 7A(2); Neb. Rev. Stat. § 25-1912(1) (Cum. Supp. 2006).

No. A-08-696: **Lewis v. Daley**. Appeal dismissed. See, rule 7A(2); Neb. Rev. Stat. § 25-1912(1) (Cum. Supp. 2006).

No. A-08-697: **State v. Yos-Chiguil**. Appeal dismissed. See, rule 7A(2); Neb. Rev. Stat. § 25-1912(1) (Cum. Supp. 2006).

No. A-08-698: **Ray v. Thirty, L.L.C**. Appeal dismissed. See, § 2-107(A)(2); Neb. Rev. Stat. § 25-1315(1) (Cum. Supp. 2006). See, also, *Malolepszy v. State*, 270 Neb. 100, 699 N.W.2d 387 (2005); *Salkin v. Jacobsen*, 263 Neb. 521, 641 N.W.2d 356 (2002).

No. A-08-700: **State v. Hillard**. Appeal dismissed. See, § 2-107(A)(2); Neb. Rev. Stat. § 25-1912(1) (Cum. Supp. 2006).

No. A-08-709: **Lewis v. Bryan Med. Ctr. West**. Affirmed. See § 2-107(A)(1).

No. A-08-714: **In re Estate of Carlson**. Appeal dismissed. See, § 2-107(A)(2); Neb. Rev. Stat. §§ 25-1144.01 and 25-1912(1) (Cum. Supp. 2006).

No. A-08-716: **Gallagher v. Department of Corrections**. Appeal dismissed. See, § 2-107(A)(2); Neb. Rev. Stat. § 25-1912(1) (Cum. Supp. 2006).

No. A-08-725: **Hernandez v. Department of Corr. Servs**. Appeal dismissed as moot. See rule 7A(2).

No. A-08-729: **Shepard v. Roach**. Appeal dismissed. See § 2-107(A)(2).

No. A-08-732: **State v. Worm**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-08-737: **State v. Lame**. Appeal dismissed. See, § 2-107(A)(2); Neb. Rev. Stat. § 25-1912 (Cum. Supp. 2006).

No. A-08-740: **State v. Harre**. Appeal dismissed. See §§ 2-107(A)(2) and 2-101(B)(4).

No. A-08-767: **Tyler v. Department of Corr. Servs**. Appeal dismissed as moot. See § 2-107(A)(2).

No. A-08-768: **Elstun v. Elstun**. Appeal dismissed. See, § 2-107(A)(2); Neb. Rev. Stat. § 25-1912 (Cum. Supp. 2006); *Elstun v. Elstun*, 257 Neb. 820, 600 N.W.2d 835 (1999).

No. A-08-786: **Spence v. Bush**. Appeal dismissed. See, § 2-107(A)(2); *Robbins v. Robbins*, 3 Neb. App. 953, 536 N.W.2d 77 (1995).

No. A-08-798: **Shepard v. Shepard**. Appeal dismissed. See § 2-107(A)(2).

LIST OF CASES ON PETITION FOR FURTHER REVIEW

No. A-04-068: **Widtfeldt v. Holt Cty. Bd. of Equal.**, 12 Neb. App. 499 (2004). Petition of appellant for further review denied on June 6, 2008, for lack of jurisdiction.

No. A-05-895: **City of Ashland v. Remmen**. Petition of appellee for further review overruled on November 21, 2007.

No. S-05-906: **Holmstedt v. York Cty. Jail Supervisor**, 15 Neb. App. 893 (2007). Petition of appellee for further review sustained on October 16, 2007.

No. A-05-948: **State v. Bryant**. Petition of appellant for further review overruled on November 15, 2007.

No. A-05-1007: **Goeke v. Goeke**. Petition of appellee for further review overruled on October 16, 2007.

No. A-05-1020: **Rambo v. Sullivan R.E. Group**. Petition of appellant for further review overruled on October 16, 2007.

No. A-05-1037: **Miles v. Omaha City Council**. Petition of appellant for further review overruled on January 24, 2008.

No. A-05-1038: **Eagle Run Square II v. Lamar's Donuts Internat.**, 15 Neb. App. 972 (2007). Petition of appellee for further review overruled on December 12, 2007.

No. A-05-1200: **Damrow v. Murdoch**, 15 Neb. App. 920 (2007). Petition of appellant for further review overruled on October 24, 2007.

No. A-05-1215: **State on behalf of F.J. v. McSwine**. Petition of appellant for further review overruled on October 31, 2007.

No. A-05-1226: **Kirkwood v. State**, 16 Neb. App. 459 (2008). Petition of appellant for further review overruled on April 16, 2008.

No. A-05-1227: **Blankenship v. JRFM, Inc**. Petition of appellant for further review overruled on May 7, 2008.

No. S-05-1250: **Yah v. Select Portfolio**. Petition of appellant for further review overruled on October 30, 2007.

No. A-05-1271: **Mitchell v. Team Financial**, 16 Neb. App. 14 (2007). Petition of appellant for further review overruled on December 12, 2007.

No. A-05-1273: **Hubka-Randall v. Randall**. Petition of appellant for further review overruled on February 13, 2008.

No. A-05-1399: **Petersen v. Lindsay Mfg. Co**. Petition of appellant for further review overruled on November 15, 2007.

No. A-05-1464: **Koziol v. Koziol**. Petition of appellee for further review overruled on January 16, 2008.

No. A-05-1466: **State v. Plambeck**. Petition of appellant for further review overruled on October 31, 2007.

No. A-05-1501: **Carpenter v. Parrella Motors**. Petition of appellant for further review overruled on March 26, 2008.

No. S-05-1520: **King v. Burlington Northern Santa Fe Ry. Co.**, 16 Neb. App. 544 (2008). Petition of appellant for further review sustained on July 16, 2008.

No. A-06-033: **Hoppes v. Neth**. Petition of appellee for further review overruled on October 31, 2007.

No. A-06-050: **Department of Roads v. Transcore ITS**. Petition of appellant for further review overruled on March 12, 2008.

Nos. A-06-092, A-06-093: **Mitchell v. Mitchell**. Petitions of appellant for further review overruled on January 24, 2008.

No. S-06-230: **DeWester v. Dundy County**. Petition of appellant for further review sustained on October 16, 2007.

No. A-06-243: **Murphy v. Brown**, 15 Neb. App. 914 (2007). Petition of appellant for further review overruled on October 12, 2007, as untimely filed.

No. A-06-321: **Villanueva v. City of South Sioux City**, 16 Neb. App. 288 (2008). Petition of appellee for further review overruled on February 21, 2008.

No. A-06-334: **State v. Tyma**. Petition of appellant for further review overruled on April 9, 2008.

Nos. A-06-340, A-06-662: **Stuck v. Michel**. Petitions of appellant for further review overruled on May 7, 2008.

No. A-06-370: **Densberger v. State**. Petition of appellant for further review overruled on June 18, 2008.

Nos. A-06-408, A-06-409: **In re Trust of Alexis**, 16 Neb. App. 416 (2008). Petitions of appellee for further review overruled on June 4, 2008.

No. S-06-427: **Wagner v. Wagner**, 16 Neb. App. 328 (2008). Petition of appellant for further review sustained on March 12, 2008.

No. A-06-433: **Daubenmier v. Spence**, 16 Neb. App. 435 (2008). Petition of appellant for further review overruled on April 23, 2008.

No. A-06-524: **State v. Malcom**. Petition of appellant for further review overruled on October 16, 2007.

No. A-06-525: **Vogt v. Neth**. Petition of appellant for further review overruled on March 12, 2008.

No. A-06-556: **State v. Aguilar**. Petition of appellant for further review overruled on January 16, 2008.

No. A-06-566: **State v. Cole**. Petition of appellant for further review overruled on July 2, 2008.

No. A-06-572: **Jones v. Stahr**, 16 Neb. App. 596 (2008). Petition of appellees for further review overruled on May 14, 2008.

No. A-06-630: **Ostergard v. State**, 16 Neb. App. 459 (2008). Petition of appellant for further review overruled on April 16, 2008.

No. A-06-633: **In re Estate of Breinig**. Petition of appellant for further review overruled on May 7, 2008.

No. A-06-657: **State v. Stewart**. Petition of appellant for further review overruled on November 21, 2007.

No. A-06-710: **Neilan v. Neilan**. Petition of appellant for further review overruled on February 27, 2008.

No. A-06-719: **In re Estate of Waite**. Petition of appellant for further review overruled on May 22, 2008.

No. A-06-738: **State v. Veatch**, 16 Neb. App. 50 (2007). Petition of appellant for further review overruled on December 19, 2007.

No. A-06-746: **Morgan v. Super 8 Motel**. Petition of appellant for further review overruled on January 31, 2008.

No. A-06-748: **MBNA America Bank v. Hansen**, 16 Neb. App. 536 (2008). Petition of appellant for further review overruled on June 11, 2008.

No. A-06-774: **Restorations & Renovations v. Feddin**. Petition of appellant for further review overruled on June 11, 2008.

Nos. S-06-800, S-07-414: **Marcovitz v. Rogers**. Petitions of appellant for further review sustained on May 22, 2008; cases to be submitted without oral argument pursuant to rule 11B(1).

No. A-06-814: **Engert v. Levitt**. Petition of appellee for further review overruled on April 16, 2008.

No. A-06-815: **Guerrero v. Guerrero**. Petition of appellant for further review overruled on April 10, 2008, as untimely filed.

No. A-06-826: **Hanus v. County Planning Comm**. Petition of appellant for further review overruled on July 2, 2008.

No. A-06-858: **City of Omaha v. Tract No. 1**. Petition of appellee for further review overruled on May 14, 2008.

No. A-06-862: **State v. Hill**. Petition of appellant for further review overruled on November 15, 2007.

No. A-06-863: **State v. Schneider**. Petition of appellant for further review overruled on November 15, 2007.

No. A-06-877: **Wild v. Wild**, 15 Neb. App. 717 (2007). Petition of appellee for further review overruled on November 21, 2007.

No. A-06-951: **In re Estate of Hue**. Petition of appellee for further review overruled on February 13, 2008.

No. A-06-985: **Brock v. Smith**. Petition of appellant for further review overruled on June 18, 2008.

No. S-06-1001: **State v. Moore**, 16 Neb. App. 27 (2007). Petition of appellee for further review sustained on January 3, 2008.

No. A-06-1004: **Rubloff Hastings v. Nash Finch Co**. Petition of appellant for further review overruled on May 22, 2008.

No. A-06-1022: **Neujahr v. Western Hills Ltd. Partnership**. Petition of appellant for further review overruled on January 31, 2008.

No. A-06-1054: **City of Omaha v. Tract No. 3**. Petition of appellant for further review overruled on May 7, 2008.

No. A-06-1065: **Tolbert v. Omaha Housing Authority**, 16 Neb. App. 618 (2008). Petition of appellant for further review overruled on May 22, 2008.

No. A-06-1067: **Marsh v. Filipi**. Petition of appellant for further review overruled on July 9, 2008.

No. A-06-1093: **State v. Warren**. Petition of appellant for further review overruled on February 27, 2008.

No. A-06-1099: **BCB Petroleum v. Kurtenbach**. Petition of appellee for further review overruled on June 11, 2008.

No. A-06-1128: **State v. Barns**. Petition of appellant for further review overruled on January 25, 2008, as untimely filed. See rule 2F(1).

No. A-06-1162: **Romo v. Ameriquest Mortgage Co**. Petition of appellant for further review overruled on February 13, 2008.

No. S-06-1163: **Wooden v. County of Douglas**, 16 Neb. App. 336 (2008). Petition of appellant for further review sustained on March 19, 2008.

No. A-06-1171: **State v. Arredondo**. Petition of appellant for further review overruled on March 12, 2008.

Nos. A-06-1186, A-06-1202: **Hagedorn v. Lierman**. Petitions of appellant for further review overruled on May 7, 2008.

No. A-06-1193: **McKay v. Hershey Food Corp**., 16 Neb. App. 79 (2007). Petition of appellant for further review overruled on January 16, 2008.

No. A-06-1199: **Colling v. Price**. Petition of appellee for further review overruled on March 26, 2008.

No. S-06-1216: **State v. Stolen**, 16 Neb. App. 121 (2007). Petition of appellant for further review sustained on January 3, 2008.

No. A-06-1232: **Ingswersen v. American Tool Cos**. Petition of appellant Irwin Industrial Tool Co. for further review overruled on November 15, 2007.

No. A-06-1275: **Larsen v. Union Pacific RR. Co**. Petition of appellant for further review overruled on May 22, 2008.

No. A-06-1280: **In re Trust of Barger**. Petition of appellant for further review overruled on February 27, 2008.

No. A-06-1281: **State ex rel. Linder v. Long**. Petition of appellee for further review overruled on March 12, 2008.

No. A-06-1283: **Nielsen v. Department of Motor Vehicles**. Petition of appellant for further review overruled on May 22, 2008.

No. A-06-1284: **Puskarich v. Nichols**. Petition of appellees for further review overruled on June 18, 2008.

No. A-06-1285: **Rainforth v. Rainforth**. Petition of appellant for further review overruled on June 11, 2008.

No. A-06-1296: **Widtfeldt v. Tax Equal. & Rev. Comm.**, 15 Neb. App. 410 (2007). Petition of appellant for further review denied on June 6, 2008, for lack of jurisdiction.

No. A-06-1301: **State v. Salinas**. Petition of appellant for further review overruled on January 3, 2008.

No. A-06-1318: **State v. Rush**, 16 Neb. App. 180 (2007). Petition of appellant for further review overruled on January 3, 2008.

No. A-06-1334: **State v. Dober**. Petition of appellant for further review overruled on November 21, 2007.

No. A-06-1350: **Edwards v. Edwards**, 16 Neb. App. 297 (2008). Petition of appellant for further review overruled on April 16, 2008.

No. A-06-1356: **Pittman v. Department of Corr. Servs**. Petition of appellant for further review overruled on January 16, 2008.

No. A-06-1357: **In re Guardianship of Charles H. & Natalya H**. Petition of appellee for further review overruled on December 12, 2007.

No. A-06-1362: **State v. Molina-Navarrete**, 15 Neb. App. 966 (2007). Petition of appellant for further review overruled on November 15, 2007.

No. S-06-1363: **Ord, Inc. v. AmFirst Bank**. Petition of appellants for further review sustained on June 11, 2008.

No. A-06-1371: **In re Interest of Connor S. & Marissa T**. Petition of appellant for further review overruled on October 10, 2007.

No. A-06-1374: **Duerr v. Bohaty**. Petition of appellant for further review overruled on January 24, 2008.

No. A-06-1379: **Reeves v. Western Heritage Credit Union**. Petition of appellant for further review overruled on July 16, 2008.

No. A-06-1382: **State v. Zesatti**. Petition of appellant for further review overruled on October 31, 2007.

No. A-06-1386: **State v. Herek**. Petition of appellant for further review overruled on May 6, 2008, as untimely filed.

No. S-06-1393: **State v. Kuhl**, 16 Neb. App. 127 (2007). Petition of appellant for further review sustained on January 24, 2008.

No. A-06-1396: **Marriott v. SID No. 230**. Petition of appellant for further review denied on July 23, 2008.

No. A-06-1396: **Marriott v. SID No. 230**. Petition of appellee for further review denied on July 23, 2008.

No. A-06-1407: **State v. Blair**. Petition of appellant for further review overruled on October 16, 2007.

No. A-06-1414: **State v. Jenkins**. Petition of appellant for further review overruled on December 12, 2007.

No. A-06-1440: **Morales v. Swift Beef Co.**, 16 Neb. App. 90 (2007). Petition of appellant for further review overruled on December 19, 2007.

No. A-06-1454: **Classe v. College of Saint Mary**. Petition of appellant for further review overruled on October 24, 2007.

No. A-06-1463: **State v. Pavon**. Petition of appellant for further review overruled on May 14, 2008.

No. A-07-018: **Meints v. City of Beatrice**. Petition of appellant for further review overruled on May 7, 2008.

No. A-07-037: **State v. Freeman**. Petition of appellant for further review overruled on May 22, 2008.

No. A-07-068: **In re Estate of Gibreal**. Petition of appellant for further review overruled on June 11, 2008.

No. A-07-072: **Yelli v. Neth**. Petition of appellant for further review overruled on October 16, 2007.

No. A-07-080: **Kacin v. Bel Fury Investments**. Petition of appellee for further review overruled on June 4, 2008.

No. A-07-090: **Wilmot v. Snelling**. Petition of appellant for further review overruled on June 25, 2008.

No. A-07-098: **State v. Cruz**. Petition of appellant for further review overruled on December 19, 2007.

No. A-07-102: **Gebhardt v. Gebhardt**, 16 Neb. App. 565 (2008). Petition of appellant for further review overruled on June 11, 2008.

No. A-07-103: **State v. Blakeman**, 16 Neb. App. 362 (2008). Petition of appellant for further review overruled on May 7, 2008.

No. A-07-106: **Timothy T. v. Shireen T.**, 16 Neb. App. 142 (2007). Petition of appellant for further review overruled on January 24, 2008.

No. A-07-135: **Fittro v. Fittro**. Petition of appellant for further review overruled on January 16, 2008.

No. A-07-140: **State v. Roberts**. Petition of appellant for further review overruled on October 31, 2007.

No. A-07-142: **Barnes v. Barnes**. Petition of appellant for further review overruled on February 27, 2008.

No. A-07-143: **Hendrix v. Sivick**. Petition of appellant for further review overruled on October 24, 2007.

No. A-07-151: **Worley v. Houston**, 16 Neb. App. 634 (2008). Petition of appellee for further review overruled on June 18, 2008.

No. A-07-154: **Mengedoht v. Robinson**. Petition of appellant for further review overruled on April 23, 2008.

No. S-07-165: **Trump v. Trump**. Petition of appellant for further review sustained on May 14, 2008.

No. A-07-190: **State v. Hatt**, 16 Neb. App. 397 (2008). Petition of appellee for further review overruled on April 9, 2008.

No. A-07-196: **State v. Hansen**. Petition of appellant for further review overruled on October 24, 2007.

No. A-07-200: **Sherrod v. State**. Petition of appellant for further review overruled on October 24, 2007.

No. A-07-201: **In re Interest of Kolt S. & Ariel R**. Petition of appellee State for further review overruled on November 15, 2007.

No. A-07-208: **Velehradsky v. Velehradsky**. Petition of appellant for further review overruled on November 21, 2007.

No. A-07-214: **State v. Rott**. Petition of appellant for further review overruled on November 21, 2007.

No. A-07-223: **State v. Harden**. Petition of appellant for further review overruled on March 12, 2008.

No. A-07-232: **State v. Shannon**. Petition of appellant for further review overruled on April 16, 2008.

No. A-07-238: **In re Interest of Harrison H**. Petition of appellant for further review overruled on January 24, 2008.

No. A-07-238: **In re Interest of Harrison H**. Petition of appellee Todd H. for further review overruled on January 24, 2008.

No. S-07-256: **State v. Brauer**, 16 Neb. App. 257 (2007). Petition of appellant for further review sustained on January 24, 2008.

No. S-07-256: **State v. Brauer**, 16 Neb. App. 257 (2007). Petition of appellant for further review dismissed on July 16, 2008, as having been improvidently granted.

No. A-07-280: **Bellevue Rod & Gun Club v. Sarpy Cty. Bd. of Equal**. Petition of appellant for further review overruled on January 16, 2008.

No. A-07-281: **In re Interest of Naif A. et al**. Petition of appellant for further review overruled on November 15, 2007.

No. A-07-290: **State v. Kitchens**. Petition of appellant for further review overruled on April 9, 2008.

No. A-07-291: **State v. Burkhardt**. Petition of appellant for further review overruled on January 3, 2008.

No. A-07-307: **Neilan v. Neilan**. Petition of appellant for further review overruled on December 12, 2007.

No. A-07-310: **In re Interest of Jeff D**. Petition of appellant for further review overruled on October 31, 2007.

No. A-07-311: **In re Interest of Mindy D**. Petition of appellant for further review overruled on October 31, 2007.

No. A-07-320: **State v. Shannon**. Petition of appellant for further review overruled on April 9, 2008.

No. A-07-350: **State v. Balash**. Petition of appellant for further review overruled on December 12, 2007.

No. A-07-351: **Guider v. Anderson**. Petition of appellant for further review overruled on March 19, 2008.

No. A-07-356: **Williams v. Neth**. Petition of appellant for further review overruled on January 16, 2008.

No. A-07-362: **In re Interest of Lauren B**. Petition of appellant for further review overruled on November 21, 2007.

No. A-07-365: **Heppler v. Omaha Cable**, 16 Neb. App. 267 (2007). Petition of appellant for further review overruled on February 27, 2008.

No. A-07-369: **State v. Poole**. Petition of appellant for further review overruled on January 3, 2008.

No. A-07-405: **State v. Hightower**. Petition of appellant for further review overruled on November 15, 2007.

No. A-07-408: **Spotanski v. Willyard**. Petition of appellant for further review overruled on October 31, 2007.

No. A-07-424: **Doremus v. Doremus**. Petition of appellant for further review overruled on February 27, 2008.

No. A-07-427: **In re Interest of Tyler L. & Alyssa L**. Petition of appellant for further review overruled on October 31, 2007.

No. A-07-440: **Calta v. Allstate Ins. Co**. Petition of appellant for further review overruled on April 9, 2008.

No. S-07-447: **Jefferson v. State**. Petition of appellant for further review overruled on October 30, 2007.

No. A-07-457: **State v. Antoniak**, 16 Neb. App. 445 (2008). Petition of appellant for further review overruled on April 9, 2008.

No. A-07-461: **State v. Guerrero**. Petition of appellant for further review overruled on October 31, 2007.

No. A-07-463: **Sherwood v. Sherwood**. Petition of appellant for further review overruled on July 16, 2008.

No. S-07-464: **State v. Head**. Petition of appellee for further review sustained on March 19, 2008.

No. A-07-466: **In re Interest of Tyler N. et al**. Petition of appellant for further review overruled on December 12, 2007.

No. A-07-467: **In re Interest of Michael S.**, 16 Neb. App. 240 (2007). Petition of appellee State for further review overruled on February 13, 2008.

No. A-07-473: **Waite v. Carpenter**. Petition of appellant for further review overruled on October 31, 2007.

No. A-07-473: **Waite v. Carpenter**. Petition of appellant for further review overruled on February 13, 2008.

No. A-07-478: **State v. Gutierrez-Pizano**. Petition of appellant for further review overruled on January 24, 2008.

No. A-07-480: **Perkins v. Perkins**. Petition of appellant for further review overruled on July 9, 2008.

Nos. A-07-487 through A-07-489: **State v. Gooch**. Petitions of appellant for further review overruled on December 19, 2007.

No. A-07-506: **State v. Rodwell**. Petition of appellant for further review overruled on February 13, 2008.

No. S-07-519: **Freeburger v. Department of Motor Vehicles**. Petition of appellant for further review sustained on January 16, 2008.

No. A-07-520: **Hokom v. Neth**. Petition of appellant for further review overruled on December 19, 2007.

No. A-07-521: **Stehlik v. Stehlik**. Petition of appellant for further review overruled on June 18, 2008.

No. A-07-549: **In re Interest of Morraghan J**. Petition of appellant for further review overruled on December 19, 2007.

No. A-07-550: **Holmes v. Chief Indus.**, 16 Neb. App. 589 (2008). Petition of appellee for further review overruled on May 14, 2008.

No. A-07-552: **Boxum v. Munce**, 16 Neb. App. 731 (2008). Petition of appellee for further review denied on July 23, 2008.

No. S-07-556: **State v. Schmidt**, 16 Neb. App. 741 (2008). Petition of appellant for further review sustained on July 16, 2008.

No. A-07-567: **Yelli v. Neth**, 16 Neb. App. 639 (2008). Petition of appellant for further review overruled on May 22, 2008.

No. S-07-572: **In re Interest of Markice M**. Petition of appellant for further review sustained on February 27, 2008.

No. A-07-573: **State v. Clayton**. Petition of appellant for further review overruled on June 4, 2008.

No. A-07-581: **State v. Hansen**. Petition of appellant for further review overruled on November 27, 2007.

No. S-07-582: **Metropolitan Utilities Dist. v. Liberty Dev. Corp**. Petition of appellant for further review sustained on December 12, 2007.

No. A-07-590: **State v. Mudloff**. Petition of appellant for further review overruled on January 16, 2008.

No. A-07-597: **State v. Greenwood**. Petition of appellant for further review overruled on November 15, 2007.

Nos. A-07-604, A-07-605: **In re Interest of Hailey M**. Petitions of appellant for further review overruled on March 26, 2008.

No. A-07-606: **State on behalf of Bivans v. Bivans**. Petition of appellant for further review overruled on June 11, 2008.

No. A-07-607: **State v. Rideout**. Petition of appellant for further review overruled on November 15, 2007.

No. A-07-621: **State v. Meyer**. Petition of appellant for further review overruled on January 3, 2008.

No. A-07-624: **State v. Sinner**. Petition of appellant for further review overruled on January 16, 2008.

No. A-07-630: **Halac v. Girton**. Petition of appellant for further review overruled on March 12, 2008.

No. A-07-634: **State v. Ormesher**. Petition of appellant for further review overruled on February 13, 2008.

No. S-07-648: **Timmerman v. Neth**. Petition of appellant for further review sustained on March 12, 2008.

No. A-07-651: **Clayton v. Warford**. Petition of appellant for further review overruled on October 10, 2007.

No. A-07-653: **State v. Chae**. Petition of appellant for further review overruled on January 16, 2008.

No. A-07-656: **Norby v. Farnam Bank**. Petition of plaintiffs-appellees for further review overruled on April 23, 2008.

No. A-07-657: **Mengedoht v. Samuelson**. Petition of appellant for further review overruled on June 4, 2008.

No. A-07-659: **State v. Ashcraft**. Petition of appellant for further review overruled on July 9, 2008.

Nos. A-07-666, A-07-667: **State v. Clinesmith**. Petitions of appellant for further review overruled on January 24, 2008.

No. A-07-674: **State v. Dvarro**. Petition of appellant for further review overruled on October 16, 2007.

No. A-07-680: **Grange v. Grange**. Petition of appellant for further review overruled on May 22, 2008.

No. A-07-695: **State v. Johnson**. Petition of appellant for further review overruled on January 3, 2008.

No. A-07-696: **State v. Drewes**. Petition of appellant for further review overruled on December 12, 2007.

No. A-07-703: **Weyers v. Peters**. Petition of appellant for further review overruled on April 23, 2008.

No. A-07-715: **State v. Truesdale**. Petition of appellant for further review overruled on April 23, 2008.

Nos. A-07-716, A-07-717: **State v. McCormick**. Petitions of appellant for further review overruled on January 25, 2008, as untimely filed. See rule 2F(1).

No. A-07-719: **In re Interest of Brittany M. et al**. Petition of appellant for further review overruled on June 4, 2008.

No. A-07-719: **In re Interest of Brittany M. et. al**. Petition of appellee Shane S. for further review overruled on June 4, 2008.

No. A-07-739: **Melgar v. Divercon Construction**. Petition of appellant for further review overruled on June 11, 2008.

No. A-07-743: **State v. Sledge**. Petition of appellant for further review overruled on March 12, 2008.

No. A-07-744: **State on behalf of McCowin v. Wells**. Petition of appellant for further review overruled on October 12, 2007, as untimely filed.

No. A-07-750: **In re Interest of Kyle S**. Petition of appellant for further review overruled on January 16, 2008.

No. A-07-752: **Ginter v. Ginter**. Petition of appellant for further review overruled on March 12, 2008.

No. A-07-761: **Shemwell v. Hawk, Inc**. Petition of appellant for further review overruled on June 18, 2008.

No. A-07-771: **State v. McConkey**. Petition of appellant for further review overruled on March 19, 2008.

No. A-07-777: **State v. Colby**, 16 Neb. App. 644 (2008). Petition of appellant for further review overruled on May 30, 2008, as untimely filed.

No. A-07-783: **State v. Sunday**. Petition of appellant for further review overruled on January 18, 2008.

No. A-07-786: **State v. Roark**. Petition of appellant for further review overruled on May 7, 2008.

No. A-07-819: **State v. Hansen**. Petition of appellant for further review overruled on March 19, 2008.

No. A-07-821: **State v. Riddle**. Petition of appellant for further review overruled on February 29, 2008. See rule 1F(1).

No. A-07-822: **State v. Carter**. Petition of appellant for further review overruled on July 9, 2008.

No. A-07-833: **State v. Blankenfeld**. Petition of appellant for further review overruled on February 27, 2008.

No. A-07-846: **State v. Davis**. Petition of appellant for further review overruled on June 18, 2008.

No. A-07-851: **State v. Dockery**. Petition of appellant for further review overruled on October 31, 2007.

No. A-07-857: **Fraternal Order of Eagles v. Marvin**. Petition of appellant for further review overruled on July 16, 2008.

No. A-07-859: **Alvarez v. Carpetland**. Petition of appellant for further review overruled on March 26, 2008.

No. A-07-861: **Mengedoht v. Newton**. Petition of appellant for further review overruled on June 4, 2008.

No. A-07-867: **Breinig v. Breinig**. Petition of appellant for further review overruled on February 21, 2008.

No. A-07-871: **In re Interest of Daniel V. & Julia V**. Petition of appellant for further review overruled on March 26, 2008.

No. A-07-878: **In re Interest of Justyce J**. Petition of appellant for further review overruled on April 16, 2008.

No. A-07-890: **In re Interest of Dakota S. et al**. Petition of appellant for further review overruled on June 11, 2008.

No. A-07-894: **In re Interest of Hunter A**. Petition of appellant for further review overruled on April 9, 2008.

Nos. A-07-897, A-07-898: **State v. Moreno**. Petitions of appellant for further review overruled on May 7, 2008.

No. A-07-907: **In re Interest of Raven M**. Petition of appellant for further review overruled on February 13, 2008.

No. A-07-908: **State v. Callahan**. Petition of appellant for further review overruled on June 4, 2008.

No. A-07-912: **State v. McCarthy**. Petition of appellant for further review overruled on April 23, 2008.

No. A-07-925: **Scott v. Drivers Mgmt., Inc**. Petition of appellant for further review overruled on May 14, 2008.

No. A-07-926: **State v. Cantando**. Petition of appellant for further review overruled on July 2, 2008.

No. A-07-930: **State v. Agee**. Petition of appellant for further review denied on July 23, 2008.

No. A-07-940: **In re Interest of Antoine G**. Petition of appellant for further review overruled on January 16, 2008.

No. A-07-941: **Shiers v. Luff**. Petition of appellant for further review overruled on May 7, 2008.

No. A-07-956: **In re Interest of Al-Brion L. & Brivaughn L**. Petition of appellant for further review overruled on December 28, 2007, as filed out of time.

No. A-07-974: **State v. Streebin**. Petition of appellant for further review overruled on March 12, 2008.

No. A-07-983: **In re Interest of BritanyAnn B. et al**. Petition of appellant for further review overruled on March 26, 2008.

No. A-07-994: **McNamee v. Marriott Reservation Ctr.**, 16 Neb. App. 626 (2008). Petition of appellant for further review overruled on May 14, 2008.

No. A-07-1001: **Fulmer v. H & S Enterprises**. Petition of appellant for further review overruled on June 11, 2008.

No. A-07-1002: **State v. Waegli**. Petition of appellant for further review overruled on June 4, 2008.

No. A-07-1003: **State ex rel. Linder v. Dahlgren Cattle Co**. Petition of appellant for further review overruled on May 14, 2008.

No. A-07-1018: **State v. Coleman**. Petition of appellant for further review overruled on April 9, 2008.

No. A-07-1023: **State v. Fuller**. Petition of appellant for further review overruled on March 12, 2008.

No. A-07-1058: **In re Interest of Justin S**. Petition of appellant for further review overruled on June 25, 2008.

No. A-07-1077: **State v. Herman**. Petition of appellant for further review overruled on April 9, 2008.

No. A-07-1081: **In re Interest of Amanda F. et al**. Petition of appellant for further review overruled on April 28, 2008.

No. A-07-1097: **State v. Vigil**. Petition of appellant for further review overruled on March 10, 2008, as filed out of time. See rule 2F(1).

No. A-07-1100: **State v. Axtell**. Petition of appellant for further review overruled on July 2, 2008.

No. A-07-1101: **State v. Gill**. Petition of appellant for further review overruled on June 4, 2008.

No. A-07-1107: **State v. Ross**. Petition of appellant for further review overruled on May 14, 2008.

No. A-07-1120: **State v. Benoit**. Petition of appellant for further review overruled on May 22, 2008.

No. A-07-1122: **Widtfeldt v. Holt Cty. Bd. of Equal**. Petition of petitioner-appellant for further review overruled on February 27, 2008.

No. A-07-1122: **Widtfeldt v. Holt Cty. Bd. of Equal**. Petition of petitioner-appellant for further review denied on June 6, 2008, for lack of jurisdiction.

No. A-07-1123: **State v. Bernhardt**. Petition of appellant for further review overruled on May 7, 2008.

No. A-07-1133: **Sutton v. Killham**. Petition of appellant for further review overruled on May 7, 2008.

No. A-07-1145: **State v. Capps**. Petition of appellant for further review overruled on July 2, 2008.

No. A-07-1149: **Harper v. Houston**. Petition of appellant for further review overruled on May 14, 2008.

No. A-07-1159: **Hitchcock v. Neth**. Petition of appellant for further review overruled on June 25, 2008.

No. A-07-1168: **State v. Carstens**. Petition of appellant for further review overruled on May 14, 2008.

No. A-07-1175: **Thompson v. Thompson**. Petition of appellant for further review overruled on March 26, 2008.

No. A-07-1190: **Flemons v. City of Omaha**. Petition of appellant for further review overruled on January 25, 2008, as untimely filed.

No. A-07-1218: **Evers v. Bayer**. Petition of appellant for further review overruled on April 21, 2008, as untimely filed.

Nos. A-07-1233, A-07-1234: **State v. Turco**. Petitions of appellant for further review overruled on June 18, 2008.

No. A-07-1247: **Garcia v. Chimney Rock Villa**. Petition of appellant for further review overruled on July 2, 2008.

No. A-07-1252: **State v. Greuter**. Petition of appellant for further review overruled on June 11, 2008.

No. A-07-1254: **State v. Decoteau**. Petition of appellant for further review overruled on May 14, 2008.

No. A-07-1259: **In re Interest of Madison S**. Petition of appellant for further review overruled on June 25, 2008.

No. A-07-1267: **Onuachi v. Meylan Enters**. Petition of appellant for further review overruled on March 12, 2008.

No. A-07-1269: **Thompson v. Thompson**. Petition of appellant for further review overruled on March 26, 2008.

No. A-07-1274: **Harmon v. Irby Constr. Co**. Petition of appellant for further review overruled on March 26, 2008.

No. A-07-1293: **State v. Thomas**. Petition of appellant for further review overruled on June 18, 2008.

No. A-07-1296: **In re Interest of Ethan M**. Petition of appellant for further review overruled on June 25, 2008.

No. A-07-1331: **State v. Petersen**. Petition of appellant for further review overruled on May 7, 2008, as untimely filed.

No. A-07-1334: **State v. Stevens**. Petition of appellant for further review overruled on July 2, 2008.

No. A-07-1375: **State v. Sell**. Petition of appellant for further review overruled on June 18, 2008.

No. A-08-014: **Preister v. Robert's Pool & Spa**. Petition of appellee for further review overruled on April 16, 2008.

No. A-08-024: **State v. Pacha**. Petition of appellant for further review overruled on July 16, 2008.

No. A-08-060: **Hawks v. Collicott**. Petition of appellant for further review overruled on March 14, 2008, as untimely filed.

No. A-08-120: **In re Interest of Deprece A. & Latysha A**. Petition of appellant for further review overruled on July 2, 2008.

No. A-08-222: **Tyler on behalf of Tyler v. Nightengale**. Petition of appellant for further review overruled on June 11, 2008.

No. A-08-234: **Blake v. Hessler**. Petition of appellant for further review overruled on May 22, 2008.

No. A-08-246: **Lake Swanson Country Estates v. Hawks**. Petition of appellant for further review overruled on June 11, 2008.

No. A-08-253: **State v. Siefker**. Petition of appellant for further review overruled on June 4, 2008.

No. A-08-254: **Shelby v. Lacey**. Petition of appellant for further review overruled on July 2, 2008.

No. A-08-288: **Ebersbacher v. Bunge North America**. Petition of appellant for further review overruled on July 16, 2008.

No. A-08-319: **State v. Sornberger**. Petition of appellant for further review denied on July 23, 2008.

No. A-08-362: **Lewis v. Kazo**. Petition of appellant for further review overruled on June 11, 2008.

LIST OF CASES NOT DESIGNATED FOR PERMANENT PUBLICATION

No. A-05-1273: **Hubka-Randall v. Randall**. 07 NCA No. 44. Affirmed. Irwin, Judge.

Nos. A-07-604, A-07-605: **In re Interest of Hailey M**. 08 NCA No. 6. Judgment in No. A-07-604 affirmed in part, and in part dismissed. Appeal in No. A-07-605 dismissed. Carlson, Judge.

CASES DETERMINED

IN THE

NEBRASKA COURT OF APPEALS

MARY KOTLARZ AND DAVID KOTLARZ, APPELLANTS AND CROSS-APPELLEES, V. OLSON BROS., INC., A NEBRASKA CORPORATION, APPELLEE AND CROSS-APPELLEE, AND POWERS-MEYERS-CARLISLE, A PROJECT-SPECIFIC JOINT VENTURE, APPELLEE AND CROSS-APPELLANT.

740 N.W.2d 807

Filed October 9, 2007. No. A-05-1247.

1. **Summary Judgment.** Summary judgment is proper when the pleadings and the evidence admitted at the hearing disclose that there is no genuine issue as to any material fact or as to the ultimate inferences that may be drawn from those facts and that the moving party is entitled to judgment as a matter of law.
2. **Summary Judgment: Appeal and Error.** In appellate review of a summary judgment, the court views the evidence in a light most favorable to the party against whom the judgment is granted and gives such party the benefit of all reasonable inferences deducible from the evidence.
3. ____: ____. A question of law raised in the course of consideration of a motion for summary judgment, as with any question of law, must be decided by the appellate court without reference to the decision of the trial court.
4. **Negligence: Proof.** The mere happening of an accident is insufficient as a matter of law to prove negligence.
5. **Negligence: Proximate Cause.** An allegation of negligence is insufficient where the finder of fact must guess the cause of the accident.
6. **Summary Judgment.** On a motion for summary judgment, the question is not how a factual issue is to be decided, but whether any real issue of material fact exists.
7. ____. Where reasonable minds differ as to whether an inference supporting the ultimate conclusion can be drawn, summary judgment should not be granted.
8. **Summary Judgment: Proof.** A party moving for summary judgment must make a prima facie case by producing enough evidence to demonstrate that the movant is entitled to judgment if the evidence were uncontroverted at trial. Once the moving party makes a prima facie case, the burden to produce evidence showing the existence of a material issue of fact that prevents judgment as a matter of law shifts to the party opposing the motion.
9. **Circumstantial Evidence.** Circumstantial evidence is not inherently less probative than direct evidence.

10. **Limitations of Actions: Service of Process.** According to Neb. Rev. Stat. § 25-217 (Cum. Supp. 2006), there is a 6-month grace period for service of summons on a defendant who has been sued within the statute of limitations.
11. **Limitations of Actions: Notice.** The relation-back statute, Neb. Rev. Stat. § 25-201.02 (Cum. Supp. 2006), eliminated the 6-month grace period from the time in which the substituted defendant could have acquired notice of the suit.

Appeal from the District Court for Douglas County: GARY B. RANDALL, Judge. Affirmed in part, and in part reversed and remanded.

James E. Harris, Britany S. Shotkoski, and Michaela Skogerboe, of Harris Kuhn Law Firm, L.L.P., for appellants.

Jerry W. Katskee and Melvin R. Katskee, of Katskee, Henatsch & Suing, for appellee Olson Bros., Inc.

P. Shawn McCann, of Sodoro, Daly & Sodoro, P.C., for appellee Powers-Meyers-Carlisle.

IRWIN, SIEVERS, and CASSEL, Judges.

SIEVERS, Judge.

Mary Kotlarz and David Kotlarz appeal the order of the district court for Douglas County granting summary judgment in favor of Olson Bros., Inc. (Olson), and Powers-Meyers-Carlisle, a project-specific joint venture (PMC) (collectively Appellees). We find that summary judgment was not proper as to defendant Olson, and therefore, we reverse, and remand the cause as to such defendant. With respect to defendant PMC, we sustain the grant of summary judgment and dismissal of the cause, although on the basis of the statute of limitations as raised in PMC's cross-appeal.

FACTUAL BACKGROUND

Viewed in a light most favorable to the Kotlarzes, the record reflects the following facts: On March 30, 1999, Mary attended a physical therapy session at Alegent Health Lakeside Clinic (the Clinic) located in Omaha. The property was under construction, but it was open to the public. On March 30, there was no construction work being performed on the premises, or in

the area where Mary parked, because it was an extremely windy day with wind gusts of around 45 miles per hour.

Around 5 p.m., after her physical therapy appointment, Mary, carrying a traction device, walked to her car, opened her trunk with a key, and placed the traction device in her car. Mary's car was facing north at the time. During this time, Mary did not notice anything blowing around in the wind. As she was closing the trunk, there was a gust of wind, and Mary felt a sharp blow to the base of her neck on the left side and then "excruciating pain." Mary did not know where the object came from, she did not see what hit her, and there were no eyewitnesses. Nevertheless, immediately after she felt the sharp blow to her neck, she saw a piece of 4- by 8-foot foam sheet, which did not appear to be damaged, fly through the air in front of her. Mary then walked back to the Clinic, and while she was walking back, she saw three foam sheets in the parking area which appeared to be the same as the foam sheet that she saw after she was struck. Mary went inside the Clinic, reported that she had been hit and that there was debris flying around outside, and then was treated for her injuries. Mary's son arrived shortly thereafter and retrieved a piece of foam sheet he found in the parking lot. Mary said that the piece of foam sheet recovered by her son was the same composition as the foam sheet that she saw right after being struck, as well as being the same as the three foam sheets Mary observed as she returned to the Clinic after the incident.

PMC was the general contractor for the building project at Alegent Health Lakeside Wellness Center (Alegent), which was located adjacent to the Clinic. PMC is a project-specific joint venture between Power Construction Company, an Illinois corporation, and Meyers-Carlisle Construction Company, a corporation qualified to do business in Nebraska. Olson was the roofing subcontractor for the building project.

PROCEDURAL BACKGROUND

On March 26, 2003, the Kotlarzes filed a complaint in the district court for Douglas County alleging that the Appellees' negligence caused injuries to Mary and that David suffered from a resulting loss of consortium due to Mary's injuries. The complaint named Olson and "Meyers-Carlisle-Leapley Construction

Co., Inc[.,] f/k/a Powers-Meyers-Carlisle" as defendants. The complaint alleged that on March 30, 1999, Mary was injured by a piece of construction material, a "4′ x 8′ piece of foam board," which was not properly secured at the construction site and which was blowing around due to strong winds at the time Mary was closing the trunk of her car. Among the allegations of negligence, the complaint stated that the Appellees failed to take and enforce adequate safety precautions and to properly secure the roofing materials.

"Meyers-Carlisle-Leapley Construction Company, Inc., f/k/a Powers-Meyers-Carlisle," filed an answer to the complaint denying any negligence. Olson's answer admitted that the winds on March 30, 1999, were "unusually strong" and that it was engaged in roofing work at the Alegent site, but Olson denied any negligence.

On August 4, 2003, the Kotlarzes and "Meyers-Carlisle-Leapley Construction Company, Inc., f/k/a Powers-Meyers-Carlisle," filed a stipulation agreeing that such party name was a misnomer and stating that "'Powers-Meyers-Carlisle, a Project-Specific Joint Venture'"—PMC—should be substituted in its place. Part of the stipulation provided that PMC was making a voluntary appearance and waiving service of process, and it was provided that PMC would have 14 days in which to answer the suit. The district court granted the stipulation.

In late August 2004, Olson filed a motion for summary judgment. On September 3, PMC filed a motion for summary judgment, alleging both that the Kotlarzes were not entitled to judgment as a matter of law and that the Kotlarzes' complaint was barred by the applicable statute of limitations. Also on September 3, PMC filed an answer and cross-claim admitting that it was the general contractor for the Alegent project; denying any negligence on its part; admitting that on March 30, 1999, Mary was attending a physical therapy appointment at the Clinic; and asserting that all construction material had been secured on the day of her appointment. PMC cross-claimed against Olson, stating that PMC had entered into a subcontract agreement with Olson for the roofing work at the premises, and prayed for contribution or indemnity against Olson in the event that PMC was found liable for all or part of the Kotlarzes' damages.

Additionally, the affidavit of Stanley Stanek, an Olson employee, was received into evidence. Stanek said that on March 30, 1999, construction was postponed because of high winds, and that in the morning, he and another employee secured "all Olson roofing materials stacked near the southwest corner of the building," making certain that the materials were "covered by a tarp and weighted by tires." Stanek also said that there was ongoing construction at properties around the Alegent site, but that he did not know whether construction was ceased at those sites on March 30. Stanek further stated he could not say that the "broken piece of foam board" recovered by Mary's son "was product that we used on the subject project or that it came from an area of the construction site under Olson's control or that of the general contractor, PMC." In attempting to contradict PMC's affirmative defense that the "accident that occurred was a result of the negligence of other persons or entities" and in response to Stanek's affidavit stating that there was construction ongoing at the properties around and adjacent to the Alegent site, Mary produced a report from a consulting meteorologist stating, within a "reasonable degree of meteorological certainty," that on March 30, the wind was from the south, gusting to around 45 miles per hour. The meteorologist opined that it was "unlikely that foam boards from [another] construction site, located approximately .4 miles to the northwest of the incident site, were the ones that struck [Mary]"; it was "highly probable that the insulation/foam board that struck [Mary] blew from the stock pile of foam board located . . . south of the incident site"; and "based on the fact that the car of [Mary] was facing north and the rear of her car was facing south, the wind which was from the south could have blown the trunk open, but not shut."

On May 24, 2005, the district court sustained the motions for summary judgment and dismissed the Kotlarzes' complaint. The district court found:

> [V]iewing the evidence in [Mary's] favor and giving her the benefit of any inferences from the evidence, a fact-finder would have to guess at the possible cause of the accident. Simply put, Mary . . . doesn't know what, if anything, hit her to cause pain in her shoulder and neck area. She saw a piece of foam construction sheet fly past her,

> but she doesn't know if that foam sheet actually hit her and she doesn't know where it came from. There is no evidence that contradicts the Olson employee's sworn statement that he helped secure all the construction materials at the site on that day and that Olson may not have actually used the type of foam board retrieved from the parking lot. There also is evidence of other construction activity going on in the area.
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> . . . .
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> . . . [T]o accept [Mary's] allegations as creating a fact issue, the court must resort to guess, speculation, conjecture, or a choice of possibilities. The court must guess that the foam construction sheet that Mary . . . saw fly past her actually hit her, when [she] herself cannot positively say so. The court must then speculate that the piece of the foam retrieved by [Mary's] son was the actual foam sheet that may or may not have hit [Mary] and may or may not have flown past her, without the benefit of any supporting evidence. The court must then accept that the foam sheet somehow came loose from the weighted tarp at the [Appellees'] construction site because it was not properly secured, again, without any such evidence.

After some maneuvering, that we need not detail here, a final order was entered, and the Kotlarzes have timely appealed.

ASSIGNMENTS OF ERROR

The Kotlarzes contend, restated and consolidated, that the trial court erred in finding that no genuine issue of material fact exists and in granting summary judgment in favor of the Appellees. On cross-appeal, PMC contends that the district court erred in failing to grant PMC's motion to dismiss and in failing to grant summary judgment based upon the statute of limitations.

STANDARD OF REVIEW

[1,2] Summary judgment is proper when the pleadings and the evidence admitted at the hearing disclose that there is no genuine issue as to any material fact or as to the ultimate inferences that may be drawn from those facts and that the moving party

is entitled to judgment as a matter of law. *Bennett v. Labenz*, 265 Neb. 750, 659 N.W.2d 339 (2003). In appellate review of a summary judgment, the court views the evidence in a light most favorable to the party against whom the judgment is granted and gives such party the benefit of all reasonable inferences deducible from the evidence. *Id.*

[3] A question of law raised in the course of consideration of a motion for summary judgment, as with any question of law, must be decided by the appellate court without reference to the decision of the trial court. See *Essen v. Gilmore*, 259 Neb. 55, 607 N.W.2d 829 (2000).

ANALYSIS

[4-8] We begin with some general principles of law. The mere happening of an accident is insufficient as a matter of law to prove negligence. *Parker v. Lancaster Cty. Sch. Dist. No. 001*, 256 Neb. 406, 591 N.W.2d 532 (1999). An allegation of negligence is insufficient where the finder of fact must guess the cause of the accident. *Id.* On a motion for summary judgment, the question is not how a factual issue is to be decided, but whether any real issue of material fact exists. *Goff-Hamel v. Obstetricians & Gyns., P.C.*, 256 Neb. 19, 588 N.W.2d 798 (1999). Where reasonable minds differ as to whether an inference supporting the ultimate conclusion can be drawn, summary judgment should not be granted. *Schade v. County of Cheyenne*, 254 Neb. 228, 575 N.W.2d 622 (1998). Moreover, a party moving for summary judgment must make a prima facie case by producing enough evidence to demonstrate that the movant is entitled to judgment if the evidence were uncontroverted at trial. *Marksmeier v. McGregor Corp.*, 272 Neb. 401, 722 N.W.2d 65 (2006). Once the moving party makes a prima facie case, the burden to produce evidence showing the existence of a material issue of fact that prevents judgment as a matter of law shifts to the party opposing the motion. *Id.*

[9] Mary's lawsuit rests on the following premises: (1) Mary was struck with a foam sheet, (2) the foam sheet was from the construction site being worked by the Appellees, and (3) the Appellees failed to secure the foam sheets at the site in the face of unusually high winds. The district court's decision, and in turn

the Appellees' argument to this court, is based largely on the fact that no one saw an object hit Mary, and Mary herself does not "know" what hit her. In considering the Appellees' arguments, we bear in mind that on a summary judgment motion, Mary gets the benefit of the evidence viewed most favorably to her, including reasonable inferences—and key factual propositions may be present (for summary judgment purposes) simply by reasonable inference. The Appellees' argument and the district court's decision appear to disregard the notion that circumstantial evidence is not inherently less probative than direct evidence. See *State v. Castor*, 262 Neb. 423, 632 N.W.2d 298 (2001).

The district court relied upon *Swoboda v. Mercer Mgmt. Co.*, 251 Neb. 347, 557 N.W.2d 629 (1997), in granting the summary judgment. In *Swoboda*, an elderly woman, Marie Swoboda, was injured when she fell on a stairway landing; she could not remember the circumstances of the fall, and there were no eyewitnesses. Swoboda's granddaughter, who was with her at the time, did not observe the fall itself, but only saw Swoboda sitting on the floor with her legs extended down the ramp that led from the landing. There was evidence that Swoboda did not have trouble walking prior to the fall and that the ramp's configuration was in violation of building codes. The district court granted summary judgment, reasoning that Swoboda's allegation that the ramp caused her fall was based solely on speculation and conjecture and that therefore, no genuine issue of material fact existed. The Nebraska Supreme Court upheld the district court's grant of summary judgment, stating that while circumstantial evidence may be used to prove causation, the evidence must be sufficient to fairly and reasonably justify the conclusion that the defendant's negligence was the proximate cause of the plaintiff's injury. The Supreme Court further stated that while Swoboda was not required to eliminate all alternate theories regarding how the accident may have happened, she was "required to establish with a reasonable probability that the accident happened in the manner alleged in her petition." *Id.* at 351, 557 N.W.2d at 632. The Supreme Court concluded that because there was no "basis" upon which a finder of fact could determine whether Swoboda tripped over the ramp which violated building codes or simply tripped on the top step, the evidence was insufficient as a matter of law

to create an inference that the ramp was the proximate cause of the fall. *Id*. at 352, 557 N.W.2d at 632. The court explained that a jury would be presented with at least two possibilities of the cause for her fall, but that the evidence "leaves the jury with the prospect of guesswork as to which of these possibilities actually caused Swoboda's injuries." *Id.* at 352-53, 557 N.W.2d at 633. In contrast to *Swoboda, supra*, Mary has provided a basis for a jury to determine how her injury occurred, although her chain of causation is admittedly circumstantial evidence. Whether a jury would accept the chain of circumstantial evidence is not the issue on this motion for summary judgment. In *Swoboda*, a jury would have no evidentiary basis—circumstantial or direct—upon which to decide that the out-of-code ramp was the cause of the fall, but this record presents a different case.

Additionally, the Kotlarzes correctly point out that in *Swoboda*, the plaintiff could not remember the circumstances surrounding her fall, while in this case, Mary recalls all of the circumstances of the incident on March 30, 1999. "[I]t is merely the fact that she could not see what was coming up from behind her that prevents her from saying for sure what struck her." Brief for appellants at 6.

Mary saw a foam sheet fly past her immediately upon being struck, but she did not "know" what hit her or where the object came from that hit her. Only with rearview vision could Mary truly "know" what struck her, but if complete personal knowledge or an eyewitness were the legal standard, circumstantial evidence would be of little or no value. Clearly, circumstantial evidence may be used to prove causation, provided it fairly and reasonably justifies the conclusion that the Appellees' negligence was the proximate cause of Mary's injury. Mary was not required to eliminate all alternate theories, such as a piece of material from another construction site hitting her.

The Appellees adduced evidence that they covered and weighted down their foam sheets. The Appellees also produced an affidavit from Stanek, in which Stanek stated he could not say that the "broken piece of foam board" recovered by Mary's son was a product Olson or PMC used on the subject project or that it came from an area of the construction site under Olson's or PMC's control. But, such evidence is not conclusive on this

motion for summary judgment and may be met by opposing circumstantial evidence—which it has been in this case.

Viewing the evidence in a light most favorable to Mary, there was circumstantial evidence leading to three inferences. First, there is an inference that Mary was struck by the foam sheet, because Mary saw a foam sheet fly by her immediately after she was struck, and the wind was blowing at her back—which could cause a foam sheet to fly toward her back as she stood at the trunk of her car. Given the reasonable inference that Mary was struck by a foam sheet, the second permissible inference is that the foam sheet came from the Appellees' pile of foam sheets. The record shows that the Appellees had foam sheets at the construction site, and Mary testified that she saw three other foam sheets in the parking lot that were the same as the one that flew past her—and the location of the stored foam sheets in relation to Mary's location, given the direction of the wind, would be consistent with potential of such a sheet being blown toward her. The third inference is that the Appellees did not properly secure their roofing materials, given Mary's testimony in her deposition that she saw three other foam sheets in the parking area as she walked back to the Clinic that were the same as the one she saw fly by her when she was struck. This evidence allows the inference that the foam sheets at the Alegent construction site were not secured and weighted down; otherwise, four foam sheets would not have been blowing around the parking area.

The evidence, when viewed most favorably to Mary, allows the reasonable inference that she was struck by a foam sheet from the Appellees' supply thereof at their Alegent construction site, which supply had not been properly secured in the face of severe winds. Such conclusions would not be guesses or speculation, but, rather, acknowledgment that necessary factual propositions can be proved circumstantially. Therefore, summary judgment was improper on this record.

PMC alleges that the trial court erred in not dismissing PMC from the lawsuit on statute of limitations grounds. The suit was filed 4 days before the statute of limitations for a personal injury action such as this would have run. See Neb. Rev. Stat. § 25-207 (Reissue 1995). PMC concedes that it has waived any defense of

lack of jurisdiction, insufficiency of process, and insufficiency of service of process. PMC's argument is that because it was not named as a proper defendant in the complaint filed on March 26, 2003, and was substituted as a party pursuant to a stipulation on August 4, PMC was not sued within the 4-year statute of limitations for tort actions.

[10] Through the stipulation, the parties agreed upon the proper defendant, PMC. The originally named party was "Meyers-Carlisle-Leapley Construction Co., Inc[.,] f/k/a Powers-Meyers-Carlisle, a Nebraska Corporation." On May 21, 2003, Robert J. Carlisle was served with the summons. Such service was within the 6-month "grace period" for service of summons on a defendant who has been sued within the statute of limitations. See Neb. Rev. Stat. § 25-217 (Cum. Supp. 2006). See, also, *Smeal v. Olson*, 263 Neb. 900, 644 N.W.2d 550 (2002).

On June 17, 2003, attorney Michael T. Gibbons wrote to Jeffrey A. Karp, who identified himself in his summary judgment affidavit as the executive vice president of Power Construction Company. Karp's affidavit also stated that he was the "Project Executive" for PMC on the Alegent construction project. Gibbons' letter to Karp was attached to Karp's affidavit and stated:

> As you may or may not be aware, Meyers-Carlisle was recently sued by an individual who allegedly suffered injury while exiting [the Clinic] on March 30, 1999. As you can see from the face of the Complaint, [the Kotlarzes] have incorrectly listed Meyers-Carlisle as "Powers-Meyers-Carlisle, a Nebraska Corporation."
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> Ultimately, this lawsuit was turned over to Meyers-Carlisle's general liability insurer, Cincinnati Insurance Company. I was hired by Cincinnati Insurance Company to defend Meyers-Carlisle. Through discussing this case with Bob Carlisle, however, it has come to my attention there was a Joint Venture Agreement entered into between Power Construction and Meyers-Carlisle on July 24, 1998. . . .
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> . . . I expect [the Kotlarzes'] attorney will amend the Complaint to include the proper entity pursuant to the misnomer statute in Nebraska. Additionally, we filed an

> Answer and served [the Kotlarzes'] attorney with written discovery in an effort to expedite our quest to learn more about [Mary's] alleged injuries.

Approximately a month after this letter, Gibbons entered into the aforementioned stipulation filed on August 4, 2003, providing that the captioned defendant, "Meyers-Carlisle-Leapley Construction Company, Inc., f/k/a Powers-Meyers-Carlisle, a Nebraska corporation" (hereinafter MCL), was a misnomer and that "'Powers-Meyers-Carlisle, a Project-Specific Joint Venture'"—PMC—should be substituted in its place. The stipulation further provided that the "properly named and substituted defendants will be referred to collectively as 'Powers-Meyers-Carlisle.'" The original answer filed by Gibbons for MCL did not assert a statute of limitations defense but alleged (consistent with the stipulation) that "the Alegent . . . project was performed by a joint venture known as Powers-Meyers-Carlisle, a project-specific joint venture. This project-specific joint venture was entered into and performed by Meyers-Carlisle Construction Company . . . qualified to do business in the State of Nebraska . . . and Power Construction Company, an Illinois corporation . . . ."

The joint venture, PMC, did not file an answer or a cross-claim until September 2004, when, with counsel other than Gibbons, PMC alleged that the claim was barred by the statute of limitations. The trial court's decision did not address this defense, which we see as an issue of law. Therefore, we address the issue in light of our finding that summary judgment was improper on the liability issue.

[11] The statute of limitations defense implicates the relation-back statute, Neb. Rev. Stat. § 25-201.02 (Cum. Supp. 2006), which has been mentioned by the Nebraska Supreme Court in *Smeal v. Olson*, 263 Neb. 900, 644 N.W.2d 550 (2002) (*Smeal*), to the extent that the court noted that such statute was enacted during the time that the petition for further review of this court's decision in *Smeal v. Olson*, 10 Neb. App. 702, 636 N.W.2d 636 (2001), was pending before the Supreme Court. See 2002 Neb. Laws, L.B. 876. Therefore, in *Smeal*, the Supreme Court did not discuss the effect of the new statute, and, although the court ultimately reversed our decision, it agreed with our holding

that the time in which the substituted party could have notice of the suit included the 6-month grace period for service of process provided for in § 25-217. However, the enactment of § 25-201.02 eliminated the 6-month grace period from the time in which a substituted defendant could have acquired notice of the suit. Section § 25-201.02(2) provides:

> If the amendment changes the party or the name of the party against whom a claim is asserted, the amendment relates back to the date of the original pleading if (a) the claim or defense asserted in the amended pleading arose out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading, and (b) *within the period provided for commencing an action the party against whom the claim is asserted by the amended pleading (i) received notice of the action such that the party will not be prejudiced in maintaining a defense on the merits and* (ii) knew or should have known that, but for a mistake concerning the identity of the proper party, the action would have been brought against the party.

(Emphasis supplied.)

Smeal dealt with a substituted party who was neither sued nor served with process within the statute of limitations or the 6-month grace period provided by § 25-217, but who was alleged by the plaintiff to have had notice of the original petition before the cumulative time bar of the statute of limitations and the 6-month grace period for service under § 25-217. The Nebraska Supreme Court found that it was the substituted defendant's burden to come forward with evidence to pierce the plaintiff's allegation in the amended petition that such defendant " 'had notice of Plaintiff's original Petition prior to the time bar.' " 263 Neb. at 909, 644 N.W.2d at 558. As a result of the substituted defendant's failure to carry such burden, the summary judgment granted by the trial court was reversed.

Turning to the present case, after the substitution of the joint venture, PMC, for MCL, there was no new petition or complaint filed, and, notably, no allegation by the Kotlarzes that PMC, the joint venture, had notice of the suit before March 30, 2003. On the motion for summary judgment, the previously referenced affidavit of Karp was introduced in evidence, and it

states that PMC was aware of the incident involving Mary at the Alegent site shortly after it was reported by her, and that while PMC was aware of the potential of a claim shortly after the incident, PMC was unaware that suit had been filed until receipt of the June 17 letter from Gibbons, from which we have quoted above. Karp's affidavit stands uncontested by the Kotlarzes. As a result, PMC has carried its burden imposed by *Smeal* to show lack of notice of the suit, which notice—because of the passage of § 25-201.02—PMC must have had before the statute of limitations ran on March 30, remembering that the 6-month grace period for service under § 25-217 is no longer included in the calculation, as it was in *Smeal*. See, also, *Reid v. Evans*, 273 Neb. 714, 733 N.W.2d 186 (2007). Therefore, the statute of limitations bars the Kotlarzes' suit against PMC, the joint venture.

CONCLUSION

We, therefore, reverse the grant of summary judgment as to defendant Olson, because there are material issues of fact as to such defendant, and we remand the cause for further proceedings as to such defendant. We affirm the grant of summary judgment and the dismissal with prejudice as to PMC, but on the basis that the suit against such defendant is barred by the statute of limitations.

AFFIRMED IN PART, AND IN PART REVERSED AND REMANDED.

JOHN C. MITCHELL, APPELLEE AND CROSS-APPELLANT, V. TEAM FINANCIAL, INC., ET AL., APPELLANTS AND CROSS-APPELLEES.

740 N.W.2d 368

Filed October 9, 2007. No. A-05-1271.

1. **Contracts: Guaranty: Words and Phrases.** A guaranty is a collateral undertaking by one person to answer for the payment of a debt or the performance of some contract or duty in case of the default of another person who is liable for such payment or performance in the first instance.

2. **Contracts: Guaranty: Debtors and Creditors: Words and Phrases.** A guaranty is basically a contract by which the guarantor promises to make payment if the principal debtor defaults.
3. **Contracts: Guaranty.** A court relies on general principles of contract and guaranty law to determine the obligations of the guarantor.
4. **Contracts: Guaranty: Intent.** Because a guaranty is a contract, it must be understood in light of the parties' intentions and the circumstances under which the guaranty was given.
5. **Contracts: Sales: Time.** An earn-out provision makes a portion of the payment to the sellers contingent upon the target's reaching specified milestones during a specified period after the closing.
6. **Contracts: Sales: Value of Goods.** Earn-out provisions in merger-and-acquisition agreements are intended to accommodate the seller's desire for compensation for the anticipated future value of the transferred assets and the buyer's reciprocal desire to avoid overpaying for potential, but as yet unrealized, value.
7. **Contracts: Sales: Time.** In an earn-out provision, a portion of the purchase price depends on the success of the business during the year or two following the sale.
8. **Contracts.** If a contract of indemnity refers to and is founded on another contract, either existing or anticipated, it covenants to protect the promisee from some accrued or anticipated liability arising on the other contract.
9. **Contracts: Debtors and Creditors.** The promise of the indemnitor is not to answer for the debt, default, or miscarriage of another, but may be to make good the loss resulting from such debt, default, or miscarriage.
10. **Contracts.** A court interpreting a contract must first determine as a matter of law whether the contract is ambiguous.
11. ____. A contract written in clear and unambiguous language is not subject to interpretation or construction and must be enforced according to its terms.
12. **Contracts: Words and Phrases.** A contract is ambiguous when a word, phrase, or provision in the contract has, or is susceptible of, at least two reasonable but conflicting interpretations or meanings.
13. **Contracts.** A contract must receive a reasonable construction and must be construed as a whole, and if possible, effect must be given to every part of the contract.
14. **Contracts: Guaranty.** A guarantor is not liable on his own contract when the creditor has violated his own obligations and deprived the guarantor of the means of preventing the loss protected by the guaranty.

Appeal from the District Court for Douglas County: MARLON A. POLK, Judge. Affirmed.

Alan E. Pedersen, of McGill, Gotsdiner, Workman & Lepp, P.C., L.L.O., for appellants.

Richard A. DeWitt and David J. Skalka, of Croker, Huck, Kasher, DeWitt, Anderson & Gonderinger, L.L.C., for appellee.

IRWIN, SIEVERS, and CASSEL, Judges.

IRWIN, Judge.

I. INTRODUCTION

Team Financial, Inc. (TFIN), Team Financial Acquisition Subsidiary, Inc. (TAC), and TeamBank, N.A. (collectively the Defendants), appeal a judgment of the district court for Douglas County granting summary judgment in favor of John C. Mitchell and denying partial summary judgment for the Defendants. On appeal, the Defendants assert the district court erred in finding that a provision under an agreement with Mitchell constituted a guaranty and in finding that the Defendants breached the terms of the agreement, releasing Mitchell as guarantor. For the reasons stated below, we affirm the trial court's order.

II. BACKGROUND

On October 29, 1999, TFIN and TAC, a bank holding company that is wholly owned by TFIN, entered into an "Acquisition Agreement and Plan of Merger" (the Agreement) with Fort Calhoun Investment Co. (FCIC), a bank holding company, and Mitchell, an FCIC stockholder who has general power of attorney to act for the remaining stockholders in FCIC. Under the terms of the Agreement, TAC and TFIN agreed to purchase 100 percent of the outstanding FCIC common stock for $3,600,000.

At the time of the merger, Fort Calhoun State Bank (the Bank) was a wholly owned subsidiary of FCIC, and the Bank held a reserve amount of $84,310 for loan loss. Prior to the closing of the Agreement, TAC conducted a review of the Bank's loans. It regarded one loan in particular, "Loan No. 635110," to be a "potential problem loan." Although 74 percent of loan No. 635110 was covered by an "SBA guarantee," the remaining 26 percent, or $175,534.13, was unsecured. As a result, the parties to the Agreement agreed that an additional reserve amount (ARA) of $170,000 would be set aside for loan loss in connection to loan No. 635110. This provision was incorporated into the Agreement under section 2.4, which read in pertinent part:

> Based on a review of loans of [the Bank], TAC and FCIC have agreed that there should be established an additional reserve for loan loss [in the amount of $170,000] in

> connection with the uninsured portion of Loan No. 635110 with [that loan's] promissory note and related loan documents hereinafter referred to as "Loan No. 635110".
>
> Such Additional Reserve Amount, [$170,000,] shall be deducted at Closing from the Purchase Price (Cash Consideration) provided for in Section 2.2.

Section 2.4 under the Agreement further provided:

> (ii) . . . [A]s long as Loan No. 635110 is not in default, [the Bank] shall distribute and pay to [Mitchell] interest on the [ARA].
>
> . . . .
>
> (v) If Loan No. 635110 should be in default, the [ARA] may be reduced by [the Bank] to the extent of any loss to [the Bank].
>
> . . . .
>
> (vii) Following default[, the] Bank or its successor shall not be obligated to pay any of the [ARA] to [Mitchell] until said loan is paid in full or written off by [the Bank].
>
> (viii) [Mitchell] shall have the option to have the portion of [the loan's promissory] note not guaranteed by [the SBA guaranty] and the security thereon assigned to [Mitchell].
>
> (ix) Upon payment in full of said loan or upon said note being written off, any remaining balance of the [ARA] shall be paid to [Mitchell].
>
> (x) . . . [I]f the borrower . . . should make 24 consecutive timely monthly payments (not more than 30 days past due) of the regular principal and interest payments due on . . . Loan No. 635110 and if the borrower is not otherwise in default pursuant to the terms of the loan documents, then any remaining balance in the [ARA] shall be paid forthwith to [Mitchell] free and clear of any obligation for payment of Loan No. 635110 . . . .
>
> (xi) [The Bank] shall make quarterly reports to [Mitchell] from such time [as] Loan No. 635110 is in default until the [ARA] is exhausted.

The evidence indicates that prior to the closing of the Agreement, the Bank conducted a board of directors' meeting on February 29, 2000. Mitchell, who served as chairman of the board of directors, was present. At the meeting, a list of

substandard loans was circulated, and a loan report indicated that the principal debtor for loan No. 635110 had not made his February payment, which had been due on February 13.

The parties closed the Agreement on March 24, 2000. Although the evidence does not indicate the exact date, at some point after the closing of the Agreement, the Bank merged into TeamBank, N.A., a wholly owned subsidiary of TFIN and TAC. Because the terms of the Agreement include successors to the Bank, we will continue to refer to the newly merged bank as "the Bank."

On March 7, 2001, the Bank sent notice to the principal debtor for loan No. 635110, informing him that he was in default on the loan and that the full sum was due on or before April 7.

On December 3, 2002, more than 24 months after the closing of the Agreement, Mitchell tendered a formal demand of payment to the Defendants for the ARA of $170,000. TFIN's attorney responded by letter, stating, "My general understanding is that [loan No. 635110] went into default some time following the Effective Time of the merger and thereafter the collection efforts have been continuing." TFIN later sent a followup letter stating that when the Agreement became effective on March 24, 2000, loan No. 635110 was already in default. An additional followup letter further indicated that because there was a principal balance of $175,534.13 due on the unsecured portion of the loan, the Defendants intended to withhold the ARA to satisfy the loss.

On February 25, 2004, Mitchell filed a complaint alleging two causes of action: breach of contract and declaratory judgment seeking discharge of guarantors. In the first cause of action, Mitchell alleged that the Defendants breached section 2.4 of the Agreement because the Bank failed to make either interest payments from the ARA or quarterly reports indicating that loan No. 635110 was in default. Mitchell asserted that his rights under the Agreement were greatly impaired because he was unable to reduce or mitigate his exposure to loss as the guarantor of loan No. 635110. Under the second cause of action, Mitchell alleged that he should be discharged and excused from payment of any amount of the guaranty due to acts or omissions by the Defendants. We note here that Mitchell filed the complaint in his personal capacity. He asserted by affidavit that he

is entitled to the full $170,000 because he distributed the cash consideration in the Agreement to the other FCIC shareholders, but did not reduce their payments by the $170,000 ARA. This position is not disputed by the Defendants.

Mitchell filed a motion for summary judgment on March 23, 2005. On May 6, the Defendants filed a motion for partial summary judgment, asserting that Mitchell's second cause of action seeking a declaratory judgment and discharge of guarantors should be dismissed. Following an evidentiary hearing, the trial court granted Mitchell's motion for summary judgment and dismissed the Defendants' motion on September 19.

The trial court looked to whether the $170,000 ARA under section 2.4 constituted an earn-out provision, an indemnity clause, or a guaranty. The court found that section 2.4 "d[id] not appear to be an earn-out provision" because "[n]othing in Section 2.4 addresses the overall earnings or value of [the Bank]; rather, Section 2.4 is entirely concerned with the specific performance of Loan No. 635110" (emphasis in original). The court further found that section 2.4 did not constitute an indemnity clause because "[n]othing in the provisions of Section 2.4 serves to protect TFIN or TAC from a liability they owe or may owe to a third party." The trial court found that section 2.4 operated as a guaranty. The court noted that the $170,000 ARA, supplied by Mitchell, would be reduced by the Bank only upon the principal debtor's failure to pay. The court further noted that upon satisfaction of the debt, any remaining balance in the ARA would be paid to Mitchell "free and clear of any obligation for payment of Loan No. 635110" (emphasis in original). The court found that the Defendants breached the Agreement by failing to make quarterly reports to Mitchell and concluded that Mitchell should be released as guarantor.

III. ASSIGNMENTS OF ERROR

The Defendants assign two errors on appeal. First, they assert that the district court erred in finding that section 2.4 under the Agreement constitutes a guaranty by Mitchell to the Bank for loan No. 635110. Second, they assert that the district court erred in finding that Mitchell should be released from his obligations as guarantor.

On cross-appeal, Mitchell assigns one error. He asserts that in the event this court finds in favor of the Defendants, the district court erred in admitting certain parol evidence. Because we find that summary judgment in favor of Mitchell was proper, this cross-appeal is moot and we need not address it further.

IV. ANALYSIS

1. Standard of Review

Summary judgment is proper when the pleadings and evidence admitted at the hearing disclose that there is no genuine issue as to any material fact or as to the ultimate inferences that may be drawn from those facts and that the moving party is entitled to judgment as a matter of law. *NEBCO, Inc. v. Adams*, 270 Neb. 484, 704 N.W.2d 777 (2005); *Fraternal Order of Police v. County of Douglas*, 270 Neb. 118, 699 N.W.2d 820 (2005).

In reviewing a summary judgment, an appellate court views the evidence in the light most favorable to the party against whom the judgment is granted and gives such party the benefit of all reasonable inferences deducible from the evidence. *NEBCO, Inc. v. Adams, supra*; *Plowman v. Pratt*, 268 Neb. 466, 684 N.W.2d 28 (2004).

2. Section 2.4 Under Agreement

The Defendants challenge the trial court's finding that section 2.4 under the Agreement constitutes a guaranty. They argue that section 2.4 is not a guaranty because it operates as either an earn-out provision or an indemnity clause. We disagree.

(a) Section 2.4 as Guaranty

[1-4] A guaranty is a collateral undertaking by one person to answer for the payment of a debt or the performance of some contract or duty in case of the default of another person who is liable for such payment or performance in the first instance. *Northern Bank v. Dowd*, 252 Neb. 352, 562 N.W.2d 378 (1997); *Chiles, Heider & Co. v. Pawnee Meadows*, 217 Neb. 315, 350 N.W.2d 1 (1984). As such, a guaranty is basically a contract by which the guarantor promises to make payment if the principal debtor defaults. *Northern Bank v. Dowd, supra.* We rely on general principles of contract and guaranty law to determine the obligations of the guarantor. *Rodehorst v. Gartner*, 266 Neb.

842, 669 N.W.2d 679 (2003). Because a guaranty is a contract, it must be understood in light of the parties' intentions and the circumstances under which the guaranty was given. *NEBCO, Inc. v. Adams, supra.*

In the instant case, section 2.4 functions as a guaranty by Mitchell for the unsecured portion of loan No. 635110 because Mitchell, as guarantor, provided the $170,000 to the Bank and promised to answer for up to $170,000 of the principal debtor's default. The terms under section 2.4 of the Agreement state that the $170,000 ARA may be used by the Bank only in connection with the uninsured portion of loan No. 635110. Under those terms, if the debtor fails to make proper payments to the Bank and loan No. 635110 goes into default, the ARA may be reduced by the Bank only to the extent that the Bank experienced any loss. Moreover, the evidence further indicates that section 2.4 is a guaranty because the remaining balance of the ARA is to be returned to Mitchell free and clear of any obligation upon 24 timely consecutive payments on loan No. 635110 or upon the loan's full payment.

The Defendants argue on appeal that Mitchell cannot be a guarantor because "the identity of the debtor is not even established in the . . . Agreement." Brief for appellants at 22. This assertion is untrue. The Agreement expressly provides that the ARA in the amount of $170,000 is to be used only with "the uninsured portion of Loan No. 635110 with [the loan's] promissory note and related loan documents." The loan documents for loan No. 635110 expressly provide the name of the principal debtor. The Defendants also argued to the trial court that section 2.4 cannot operate as a guaranty because Mitchell promises to protect *the Bank* against loss or damage, not *TAC and FCIC*, the parties to the Agreement. As noted by the trial court, "TFIN and TAC concede that Section 2.4 is beneficial to them in that it protects the value of [the Bank], a wholly-owned subsidiary of TFIN and TAC." Therefore, although Mitchell's promise to guarantee loan No. 635110 benefits the Bank, it also inures to the benefit of TFIN and TAC. As such, after viewing the evidence in the light most favorable to the Defendants, we find no error in the trial court's finding that there is no genuine issue of material fact regarding section 2.4 as a guaranty.

(b) Section 2.4 as Earn-Out Provision

The Defendants argue that section 2.4 operates as an earn-out provision, or price adjustment term, instead of a guaranty because the purchase price would be reduced by the $170,000 ARA upon the principal debtor's default. We find no merit to this argument.

[5-7] Nebraska statutory and case law does not define "earn-out" provision. However, as defined by the Practising Law Institute: "An earnout provision makes a portion of the payment to the sellers contingent upon the target reaching specified milestones during a specified period after the closing. The milestones used are usually financial, such as net revenues, gross profits, EBIT, EBITDA, net income or earnings per share." Maryann A. Waryjas, *Structuring and Negotiating Earn-Outs*, Acquiring or Selling the Privately Held Company 2007, at 759, 761 (PLI Corporate Law & Practice, Course Handbook Series 2007). Earn-out provisions in merger-and-acquisition agreements have further been described as provisions that are "intended to accommodate the seller's desire for compensation for the anticipated future value of the transferred assets and the buyer's reciprocal desire to avoid overpaying for potential, but as yet unrealized, value." *Highland Capital Mgt. LP v. Schneider*, 8 N.Y.3d 406, 408 n.1, 866 N.E.2d 1020, 1021-22 n.1, 834 N.Y.S.2d 692, 693-94 n.1 (2007). As explained in Robert M. Fogler & Rob Witwer, *Buying, Selling, and Combining Businesses Under the Colorado Business Corporation Act*, 33 Colo. Law. 73, 78 (Nov. 2004), in an earn-out provision, "a portion of the purchase price depends on the success of the business during the year or two following the sale," and that is usually "tied to projected revenue or profit numbers." Furthermore, earn-out provisions alleviate the effects of information disparity by punishing a seller's withholding of information; they encourage seller shareholders to assist with transitional issues, and they discourage seller shareholders from inflating financial performance numbers. *Id.*

Viewing the evidence in the light most favorable to the Defendants and giving them the benefit of all reasonable inferences, the evidence fails to prove that section 2.4 is an earn-out provision. The $170,000 ARA was not set aside *by*

the Defendants for Mitchell as contingent payment upon the completion of specified milestones by the acquired business. Rather, the $170,000 ARA was set aside *by Mitchell* as security to the Defendants for the unsecured portion of loan No. 635110. Unlike an earn-out provision, which typically concerns the success of the *entire business* in the year or two following the sale, section 2.4 provides that the ARA in the instant case is to be utilized only when the principal debtor fails to make payments on the unsecured portion of loan No. 635110. The application of the ARA funds is in no way related to the overall performance of the acquired business.

(c) Section 2.4 as Indemnity Provision

The Defendants next argue that to the extent we determine that section 2.4 constitutes something more than an earn-out provision, it is an indemnity clause. They argue that section 2.4 is an indemnity provision because it protects TAC and TFIN should they incur potential obligation or suffer any loss due to the substandard loan. We also find no merit to this argument.

[8,9] Under Nebraska case law, if a contract of indemnity refers to and is founded on another contract, either existing or anticipated, it covenants to protect the promisee from some accrued or anticipated liability arising on the other contract. See *Currency Services, Inc. v. Passer*, 178 Neb. 286, 133 N.W.2d 19 (1965). Stated another way, the promise of the indemnitor is not to answer for the debt, default, or miscarriage of another, but may be to make good the loss resulting from such debt, default, or miscarriage. See, *Assets Realization Co. v. Roth*, 226 N.Y. 370, 123 N.E. 743 (1919); *Eckhart v. Heier, et al.*, 37 S.D. 382, 158 N.W. 403 (1916); 28 C.J. *Guaranty* § 8 at 892 (1922). The distinction between a guaranty provision and an indemnity provision is explained as follows:

> [T]he promisor in an indemnity contract undertakes to protect his promise against loss or damage through a liability on the part of the latter to a third person, while the undertaking of a guarantor or surety is to protect the promisee against loss or damage through the failure of a third person to carry out his obligations to the promisee.

38 Am. Jur. 2d *Guaranty* § 14 at 882 (1999).

In the instant case, section 2.4 does not operate as an indemnity provision. Mitchell did not undertake to protect TAC against loss or damage caused by liability on the part of TAC to a third person. On the contrary, Mitchell undertook to protect the Bank, a wholly owned subsidiary of TAC, against loss or damage caused by liability on the part of a third party to TAC. Whereas the promise of an indemnitor is to "make good any loss resulting from non-payment," Mitchell's promise is to answer for the debt, default, and miscarriage of another. See *Eckhart v. Heier, et al.*, 37 S.D. at 384, 158 N.W. at 403. As such, we find no error by the trial court in concluding that section 2.4 was not an indemnity provision.

3. Release of Guarantor

The Defendants assert that in the event this court finds section 2.4 to be a guaranty, the trial court erred in releasing Mitchell as a guarantor. The Defendants argue that a genuine issue of material fact exists regarding whether the Bank breached its contractual obligation to Mitchell under the Agreement. We disagree.

[10-13] A court interpreting a contract must first determine as a matter of law whether the contract is ambiguous. *Kluver v. Deaver*, 271 Neb. 595, 714 N.W.2d 1 (2006). A contract written in clear and unambiguous language is not subject to interpretation or construction and must be enforced according to its terms. *Id.* A contract is ambiguous when a word, phrase, or provision in the contract has, or is susceptible of, at least two reasonable but conflicting interpretations or meanings. *Id.* A contract must receive a reasonable construction and must be construed as a whole, and if possible, effect must be given to every part of the contract. *Id.*

The trial court concluded the plain meaning of section 2.4(x) to be that loan No. 635110 is in default when the payments are more than 30 days past due. It based this finding on section 2.4(x), which provides that any remaining balance of the ARA should be paid to Mitchell "if the borrower . . . should make 24 consecutive timely monthly payments (*not more than 30 days past due*)" (emphasis supplied). Under the trial court's holding, a payment is considered timely unless it is over 30 days past due. At that point, it is no longer timely and the loan is considered

to be in default. Construing the Agreement as a whole, we find no error in the trial court's finding that the term "default" means "more than 30 days past due."

Mitchell asserts that the Bank breached its obligations under the Agreement because the principal debtor defaulted on the loan and the Bank failed to notify Mitchell of the principal debtor's default. As a result, he claims the trial court correctly held that he should be released as guarantor. To determine whether the trial court correctly determined that Mitchell is not liable for the principal debtor's failure to pay on loan No. 635110, we must determine the obligations of the parties.

[14] The Nebraska Supreme Court has held that a guarantor is not liable on his own contract when the creditor has violated his own obligations and deprived the guarantor of the means of preventing the loss protected by the guaranty. *National Bank of Commerce Trust & Sav. Assn. v. Katleman*, 201 Neb. 165, 266 N.W.2d 736 (1978).

In the instant case, neither party disputes the fact that the principal debtor defaulted on the loan. TFIN and TAC initially stated in a letter that the principal debtor defaulted on the loan after the closing of the Agreement, but later retracted this assertion in a letter claiming the principal debtor defaulted on the loan prior to the March 2000 closing of the Agreement. The evidence shows that the Defendants formally notified the principal debtor by letter in March 2001 that loan No. 635110 was in default. As such, the evidence is undisputed that loan No. 635110 was in default.

Next, we look to the parties' obligations under the Agreement. Section 2.4(ii) provides, "[A]s long as Loan No. 635110 is not in default, [the Bank] shall distribute and pay to [Mitchell] interest on the [ARA]." Section 2.4(xi) further provides, "[The Bank] shall make quarterly reports to [Mitchell] from such time [as] Loan No. 635110 is in default until the [ARA] is exhausted." As such, from the date of the Agreement's closing in March 2000, the Bank was under an obligation to send Mitchell, at an interval of four times a year, either payments from the ARA interest or reports indicating the loan's default status. The evidence indicates that the Bank did not meet either obligation at any time because Mitchell never received interest payments or

quarterly reports. As such, because the Defendants violated their own obligations under the Agreement, Mitchell, as guarantor, is not liable. See *National Bank of Commerce Trust & Sav. Assn. v. Katleman, supra.*

The Defendants argue that "factual issues exist" regarding whether Mitchell had notice of the default. Brief for appellants at 30. They appear to imply that if Mitchell had notice of a default at the time of the closing, such notice would alleviate their responsibility to make quarterly reports. We note that the Defendants fail to specify in their brief which factual issues indicate that Mitchell had notice of the default prior to the closing of the Agreement. To the extent that the Defendants are referring to Mitchell's knowledge, as of the February 29, 2000, board meeting, that loan No. 635110 was past due, we find such knowledge insufficient to constitute notice of default. On February 29, loan No. 635110 was only 16 days past due, and according to the language of the Agreement, it was not yet in default. To the extent that the Defendants are referring to an alleged telephone discussion between the Bank's president and Mitchell, whereby the president alleges Mitchell was told that the loan was "delinquent," we also find such evidence insufficient to constitute notice of default. The term "delinquent" does not necessarily indicate that the loan was more than 30 days past due. Moreover, we further note that the Defendants had a *continuing* obligation to inform Mitchell of the loan's status in that the Agreement required they make quarterly reports.

Accordingly, we find no error in the trial court's finding that there is no genuine issue of material fact in dispute regarding the breach of the Agreement by the Defendants. The principal debtor defaulted on the loan, section 2.4 required that the Defendants make quarterly reports to Mitchell regarding a default on the loan, and no reports were made. As such, we find no error in upholding the release of Mitchell as guarantor.

V. CONCLUSION

We conclude that the trial court did not err in granting summary judgment in favor of Mitchell and in denying partial summary judgment to the Defendants. There is no genuine issue of material fact in dispute regarding the nature of section 2.4 as

a guaranty provision. We further conclude that there is no genuine issue of material fact in dispute regarding the Defendants' breach of the Agreement. As such, we affirm.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. JONATHON MOORE, APPELLANT.

740 N.W.2d 52

Filed October 16, 2007. No. A-06-1001.

1. **Jury Instructions: Judgments: Appeal and Error.** Whether jury instructions given by a trial court are correct is a question of law. When dispositive issues on appeal present questions of law, an appellate court has an obligation to reach an independent conclusion irrespective of the decision of the court below.
2. **Jury Instructions: Proof: Appeal and Error.** In an appeal based on a claim of an erroneous jury instruction, the appellant has the burden to show that the questioned instruction was prejudicial or otherwise adversely affected a substantial right of the appellant.
3. ____: ____: ____. To establish reversible error from a court's refusal to give a requested jury instruction, an appellant has the burden to show that (1) the tendered instruction is a correct statement of the law, (2) the tendered instruction is warranted by the evidence, and (3) the appellant was prejudiced by the court's refusal to give the tendered instruction.
4. **Assault: Intent.** A person commits the offense of assault in the first degree if he intentionally or knowingly causes serious bodily injury to another person.
5. ____: ____. The requisite intent for first degree assault relates to the prohibited act, i.e., the assault, and not to the result achieved, i.e., the injury.
6. ____: ____. First degree assault is a general intent, not a specific intent, crime.
7. **Verdicts: Appeal and Error.** On a claim of insufficiency of the evidence, an appellate court will not set aside a guilty verdict in a criminal case where such verdict is supported by relevant evidence. Only where evidence lacks sufficient probative value as a matter of law may an appellate court set aside a guilty verdict as unsupported by evidence beyond a reasonable doubt.
8. **Criminal Law: Convictions: Evidence: Appeal and Error.** In reviewing a criminal conviction, an appellate court does not resolve conflicts in the evidence, pass on the credibility of witnesses, or reweigh the evidence. Such matters are for the finder of fact, and a conviction will be affirmed, in the absence of prejudicial error, if the properly admitted evidence, viewed and construed most favorably to the State, is sufficient to support the conviction.
9. ____: ____: ____: ____. When reviewing a criminal conviction for sufficiency of the evidence to sustain the conviction, the relevant question for an appellate court is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.

Appeal from the District Court for Douglas County: J RUSSELL DERR, Judge. Reversed and remanded for a new trial.

Joseph L. Howard, of Gallup & Schaefer, for appellant.

Jon Bruning, Attorney General, and George R. Love for appellee.

IRWIN, SIEVERS, and CASSEL, Judges.

IRWIN, Judge.

I. INTRODUCTION

Jonathon Moore appeals his convictions and sentences for first degree assault and use of a deadly weapon in the commission of a felony. Among Moore's assertions on appeal are that the district court erred in the jury instructions, that there was insufficient evidence to support the convictions, and that the sentences imposed were excessive. We find reversible error concerning the jury instructions, and reverse, and remand for a new trial.

II. BACKGROUND

On or about April 3, 2005, a group of people were "hanging out" near the "Spencer projects" in Omaha, Nebraska. Moore was present and was witnessed to possess a gun, which he placed in the trunk of his girlfriend's car. At some point, Moore's half brother Karnell Burton drove past the gathering. At least one witness observed Moore spit at Karnell's vehicle as it drove past. Somebody inside Karnell's vehicle then fired multiple shots into the air.

After shots were fired by somebody inside Karnell's vehicle, Moore and a friend, Deandre Primes, got into Moore's girlfriend's vehicle and drove to the residence where Karnell lived with his mother and his sister, Kenesha Burton. According to Primes, Moore was "[u]pset" and Primes attempted to "[t]alk him down, trying to calm him down." According to Primes, a vehicle similar to Karnell's was at the house and Moore commented that the car "look[ed] like [Karnell's] car." Moore stopped his vehicle in front of the house, pulled out his gun, which he had earlier been witnessed retrieving from the vehicle's trunk, and fired a single shot in the direction of the house.

Kenesha and Karnell's mother testified that at the time Moore shot at the house, she, Kenesha, and Kenesha's friend were watching a movie. Moore's shot passed through the wall of the house and struck Kenesha in the back. Kenesha suffered injuries to both of her lungs, her liver, and her spinal cord and spent 7 weeks in a hospital. She is permanently paralyzed and confined to a wheelchair as a result of the shooting.

On June 7, 2005, the State filed an information charging Moore with first degree assault and use of a deadly weapon in the commission of a felony. Trial was held in June 2006. The jury returned verdicts of guilty on both charges. On August 15, the court sentenced Moore.

At the jury instruction conference near the end of trial, Moore had objected to certain proposed jury instructions, including instruction No. 10. Instruction No. 10 provided as follows: "If you find that [Moore] intended to do wrong, but as a result of his actions an unintended wrong occurred as a natural and probable consequence, you must find that [Moore] is guilty even though the achieved wrong was unintended." Moore objected that the instruction was confusing and would mislead the jury. The State had requested a virtually identical instruction in its proposed jury instructions. In addition, Moore requested an instruction on the definition of "'recklessly,'" which the court refused to give.

III. ASSIGNMENTS OF ERROR

Moore has assigned five errors on appeal. First, Moore asserts that the district court erred in giving jury instruction No. 10. Second, Moore asserts that the court erred in refusing to give Moore's requested instruction defining "recklessly." Third, Moore asserts that the evidence was insufficient to sustain the convictions. Fourth, Moore asserts that the sentences imposed were excessive. Fifth, Moore asserts that there was "cumulative error" warranting reversal.

IV. ANALYSIS

1. Jury Instructions

Moore argues that the district court erred in overruling Moore's objection to jury instruction No. 10 and in giving that

instruction, because the instruction "is misleading, confusing and an incorrect statement of law." Brief for appellant at 34-35. Moore also argues that the district court erred in failing to instruct the jury on the definition of "recklessly." We conclude that the instructions, when read together, were confusing or misleading on the facts of this case, and we find merit to these assignments of error.

[1-3] Whether jury instructions given by a trial court are correct is a question of law. *State v. Fischer*, 272 Neb. 963, 726 N.W.2d 176 (2007). When dispositive issues on appeal present questions of law, an appellate court has an obligation to reach an independent conclusion irrespective of the decision of the court below. *Id.* In an appeal based on a claim of an erroneous jury instruction, the appellant has the burden to show that the questioned instruction was prejudicial or otherwise adversely affected a substantial right of the appellant. *Id.* To establish reversible error from a court's refusal to give a requested jury instruction, an appellant has the burden to show that (1) the tendered instruction is a correct statement of the law, (2) the tendered instruction is warranted by the evidence, and (3) the appellant was prejudiced by the court's refusal to give the tendered instruction. *State v. Blair*, 272 Neb. 951, 726 N.W.2d 185 (2007).

[4-6] Moore was charged with first degree assault. Pursuant to Neb. Rev. Stat. § 28-308 (Reissue 1995), a person commits the offense of assault in the first degree if he intentionally or knowingly causes serious bodily injury to another person. The requisite intent for first degree assault relates to the prohibited act, i.e., the assault, and not to the result achieved, i.e., the injury. *State v. Williams*, 243 Neb. 959, 503 N.W.2d 561 (1993). That is to say, first degree assault is a general intent, not a specific intent, crime. *Id.* The required mens rea set forth in the statute applies only to the course of action that brings about the actual assault. See *State v. Cebuhar*, 252 Neb. 796, 567 N.W.2d 129 (1997).

In the present case, Moore was charged with intentionally or knowingly causing serious bodily injury to Kenesha under a theory of transferred intent. The gravamen of the theory was that Moore intended to assault Karnell but instead assaulted

Kenesha; the theory of transferred intent would allow Moore's intent to assault Karnell to "transfer" to the shooting of Kenesha. See *State v. Owens*, 257 Neb. 832, 601 N.W.2d 231 (1999). The district court instructed the jury on the theory of transferred intent in jury instruction No. 9, in which the court instructed the jury as follows:

> If you find that [Moore] intended to assault a person other than Kenesha . . . and by mistake or accident assaulted Ken[e]sha . . . the element of intent is satisfied, even though [Moore] did not intend to assault Kenesha . . . . In such a case, the law regards the intent as transferred from the original intended victim to the actual victim.

In instruction No. 10, the district court instructed the jury that if the jury found that Moore "intended to do wrong, but as a result of his actions an unintended wrong occurred as a natural and probable consequence," then the jury must find Moore guilty even though the achieved wrong was unintended. This instruction, when read in conjunction with instruction No. 9, appears to be an attempt to reflect the general intent nature of first degree assault and demonstrate to the jury that the issue related to Moore's intent was whether his action of firing the weapon at the house was done with the requisite intent and not whether he intended to injure the actual victim, Kenesha, or intended to cause the severity of injury that actually occurred, paralysis.

In *State v. Leibhart*, 266 Neb. 133, 662 N.W.2d 618 (2003), the Nebraska Supreme Court discussed the defendant's argument that there was insufficient evidence that she had intentionally or knowingly inflicted injury on her infant daughter through shaking. The court emphasized that first degree assault is a general intent crime and that the intent required relates to the assault, not the injury. The court clarified that the required intent in *State v. Leibhart* was an intent to shake the infant, not an intent to cause the specific injury that resulted.

Similarly, in the present case, the jury was instructed in the instructions, read as a whole, that the State did not have a burden to prove that Moore intended to assault Kenesha specifically or that Moore intended to cause the injuries suffered by Kenesha. Rather, the State had a burden to prove that Moore's actions

resulted in serious bodily injury to Kenesha and that Moore acted "intentionally or knowingly." See § 28-308. The requisite intent in this case was Moore's intent to commit an assault. However, instruction No. 10, together with the court's failure to instruct the jury on the definition of "recklessly," was confusing and misleading to the jury on the issue of intent.

We find no merit to Moore's arguments on appeal that instruction No. 10 allowed the jury to find him guilty based upon any number of unspecified and incorrect "wrongs" including, among other things, consuming alcohol as a minor, driving while intoxicated, using foul language, having a child out of wedlock, associating with people who carry firearms, or spitting at his brother Karnell's car and causing animosity. Instruction No. 10 specifically required the unintended wrong of Kenesha's paralysis to occur "as a natural and probable consequence" of the intended wrong.

Nonetheless, the jury instructions, read as a whole, were confusing or misleading to the jury in this case on the issue of intent. The court instructed the jury that "intentionally" meant "willfully or purposely, as distinguished from accidentally or involuntarily." Because the court rejected Moore's requested instruction defining "recklessly," however, the jury was left with instructions that suggested that the only two mens reas possible were intentional on the one hand and accidental or involuntary on the other. Then, in instruction No. 10, the court instructed the jury to find Moore guilty if the jury found that he "intended to do wrong" but some unintended consequence occurred. Read as a whole, the instructions suggested to the jury that it had to find Moore guilty if it found that he intentionally shot at the house, as opposed to accidentally doing so, without regard to whether Moore intended to assault anyone. However, intentional and accidental were not the only possible mens reas.

A review of the record makes it apparent that Moore's defense at trial was that he had acted recklessly in firing at the house, but had not intended to assault Karnell, Kenesha, or anyone else. There was evidence in the record indicating that Moore fired a single shot at the house, that it was not clear whether the house was occupied when the shot was fired, and that it was not clear whether Karnell was at the house at the time. As such,

there was evidence from which the jury could have concluded that Moore did not intend to assault anyone but fired a single shot at the house with disregard for the risks of doing so—in other words, that he acted recklessly.

Moore's requested instruction was a correct statement of law and was supported by the evidence. We conclude that Moore was prejudiced from the court's failure to give the instruction, because the jury, as a result of instruction No. 10, was left with the impression that if Moore had not acted accidentally or involuntarily when firing a shot at the house, then he was guilty of first degree assault and culpable for the unanticipated injuries caused to the unexpected victim, Kenesha. This is true only if Moore had the general intent to commit an assault, rather than having acted recklessly. Because the jury was not informed that there was any other choice of mens rea besides intentional and accidental, the instructions as a whole were confusing and misleading.

We find merit to Moore's assignments of error concerning the jury instructions. Instruction No. 10 was confusing or misleading to the jury, especially because the court refused to instruct the jury on the definition of "recklessly." Read as a whole, the instructions in this case suggested to the jury that it was to find Moore guilty and culpable for the consequences of firing a shot at a house so long as it found that he did not accidentally do so. As such, we must reverse, and, because of our conclusion regarding the sufficiency of the evidence below, remand for a new trial.

2. Sufficiency of Evidence

Next, Moore asserts that there was insufficient evidence to support his convictions. Moore argues that there was insufficient evidence to support a finding that he intentionally committed an assault and that as such, there was insufficient evidence to support the conviction for first degree assault and the corresponding conviction for use of a deadly weapon in the commission of a felony. We disagree.

[7] On a claim of insufficiency of the evidence, an appellate court will not set aside a guilty verdict in a criminal case where such verdict is supported by relevant evidence. Only where

evidence lacks sufficient probative value as a matter of law may an appellate court set aside a guilty verdict as unsupported by evidence beyond a reasonable doubt. *State v. Grosshans*, 270 Neb. 660, 707 N.W.2d 405 (2005).

[8,9] In reviewing a criminal conviction, an appellate court does not resolve conflicts in the evidence, pass on the credibility of witnesses, or reweigh the evidence. Such matters are for the finder of fact, and a conviction will be affirmed, in the absence of prejudicial error, if the properly admitted evidence, viewed and construed most favorably to the State, is sufficient to support the conviction. *State v. Gutierrez*, 272 Neb. 995, 726 N.W.2d 542 (2007). When reviewing a criminal conviction for sufficiency of the evidence to sustain the conviction, the relevant question for an appellate court is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *Id.*

In this case, the State presented evidence, as recounted above, to establish that Karnell drove past Moore, Moore spit in the direction of Karnell's vehicle, somebody in Karnell's car fired shots, and Moore responded by getting into Moore's girlfriend's vehicle, driving to Karnell's residence, observing and commenting on a vehicle looking like Karnell's at the residence, and firing a shot at the house. As a result of this action, Kenesha was shot in the back and is now paralyzed and confined to a wheelchair. The evidence was sufficient to support a rational trier of fact's conclusion that Moore intentionally or knowingly caused serious bodily injury to Kenesha, first degree assault, and did so with the use of a gun, use of a deadly weapon in the commission of a felony. This assignment of error is meritless. As such, the State is not prohibited from retrying Moore. See *State v. Noll*, 3 Neb. App. 410, 527 N.W.2d 644 (1995), *overruled on other grounds, State v. Anderson*, 258 Neb. 627, 605 N.W.2d 124 (2000).

3. Excessive Sentences

Next, Moore asserts that the sentences imposed were excessive. Moore argues that the district court abused its discretion in imposing consecutive sentences of 20 years' to 20

years' imprisonment on each conviction. In light of our resolution above of Moore's assignments of error concerning the jury instructions, we need not further address this assignment of error.

4. Cumulative Error

Finally, Moore argues that there was "cumulative" error meriting reversal. Moore argues that "some of the errors [alleged] may not have been of sufficient importance if considered separately to warrant a reversal, but if considered together, they present a genuine question as to whether [Moore] received a fair trial." Brief for appellant at 48. Inasmuch as we have already found above that there is merit to Moore's allegations of error concerning the jury instructions, there is no need to further address this assignment of error.

V. CONCLUSION

We find that the jury instructions were confusing or misleading to the jury. We find, however, that there was sufficient evidence to support a finding of guilt. As a result, we reverse, and remand for a new trial.

Reversed and remanded for a new trial.

First National Bank North Platte, Trustee, appellee, v. James and Mary Sheets et al., appellees, and First National Bank South Dakota, appellant.

740 N.W.2d 613

Filed October 16, 2007. No. A-07-632.

1. **Jurisdiction: Final Orders: Appeal and Error.** For an appellate court to acquire jurisdiction of an appeal, there must be a final order entered by the court from which the appeal is taken; conversely, an appellate court is without jurisdiction to entertain appeals from nonfinal orders.
2. **Jurisdiction: Appeal and Error.** A jurisdictional question which does not involve a factual dispute is determined by an appellate court as a matter of law.
3. **Equity: Claims: Property.** Interpleader, although authorized by statute, is an equitable remedy whereby a disinterested stakeholder in possession of property claimed by two or more persons may require them to litigate the claims of each without embroiling him or her in the controversy.

4. **Equity: Claims: Property: Parties.** In an interpleader action, the claimants of the fund should be made parties to the proceeding.
5. ____: ____: ____: ____. When two or more parties claim the ownership of a fund in the hands of a third, an action in equity may be maintained to recover the fund and to litigate and determine the ownership of it, and all persons claiming the fund are necessary and proper parties to the action.
6. **Parties.** When the determination of a controversy cannot be had without the presence of new parties to the suit, Neb. Rev. Stat. § 25-323 (Cum. Supp. 2006) directs the court to order them to be brought in.
7. **Judgments: Final Orders.** Generally, final judgments must not be conditional, and unless there is an equitable phase of the action wherein it is necessary to protect the interests of defendants, a conditional judgment is wholly void.
8. **Judgments: Final Orders: Appeal and Error.** A conditional interlocutory order is not wholly void; rather, conditional orders have no force and effect as a final order or a judgment from which an appeal can be taken.
9. **Final Orders: Appeal and Error.** A conditional interlocutory order cannot mature into a final, appealable order without further court consideration regarding the task or obligation that was purportedly not met.
10. **Judgments.** Whether a writing claimed to be a judgment is sufficient for that purpose depends more on its substance than its form.
11. **Judgments: Equity.** The void conditional judgment rule does not extend to actions in equity or to equitable relief granted within an action at law.
12. **Claims: Property: Jurisdiction.** In order to warrant an interpleader, the court must have jurisdiction of the subject matter in controversy and of the parties making adverse claims to the subject matter.

Appeal from the District Court for Lincoln County: DONALD E. ROWLANDS II, Judge. Motion for rehearing overruled.

Kirk E. Brumbaugh and Cory J. Rooney, of Brumbaugh & Quandahl, P.C., L.L.O., for appellant.

No appearance for appellees.

INBODY, Chief Judge, and CARLSON and CASSEL, Judges.

CASSEL, Judge.

INTRODUCTION

We consider the motion for rehearing filed by First National Bank South Dakota (FNB South Dakota) in response to our summary dismissal of the appeal for lack of jurisdiction. In this interpleader action, the complaint named multiple parties defendant, including one over which no jurisdiction had been obtained at the time of the district court's order determining the defendants' rights to the property. Because the action was

commenced but never disposed as to that party, the order from which FNB South Dakota attempted to appeal was not a final judgment. We overrule the motion.

BACKGROUND

First National Bank North Platte (FNB North Platte) filed a "Complaint in Interpleader." The complaint was filed on January 3, 2007, and named six defendants: James Sheets; Mary Sheets; Credit Bureau of North Platte, Inc., doing business as Professional Collection Service (Professional); Greenwood Trust Company (Greenwood); Unifund CCR Partners (Unifund); and FNB South Dakota. The complaint alleged that FNB North Platte had made a loan to James Sheets and Mary Sheets secured by a deed of trust upon certain real estate in North Platte and that the Sheetses had defaulted on the loan. FNB North Platte exercised its power of sale under the deed of trust, selling the real estate subject to unpaid real estate taxes and realizing sale proceeds of $25,109.75 in excess of the amount necessary to satisfy the indebtedness secured by FNB North Platte's deed of trust. The complaint alleged that each of the defendants may claim some right, title, or interest in the excess sale proceeds. FNB North Platte alleged that the Sheetses may be entitled to claim a homestead exemption under Neb. Rev. Stat. § 40-101 (Reissue 2004). It alleged that each of the other defendants may claim an interest pursuant to various judgments specifically alleged in the complaint.

FNB North Platte requested issuance of summons only as to the Sheetses, apparently relying upon voluntary appearances by the remaining defendants. Except for Greenwood, each of the defendants voluntarily appeared and filed pleadings asserting their claims to the excess sale proceeds. Greenwood filed no voluntary appearance or pleading, and no process was issued or served against Greenwood.

On March 13, 2007, FNB North Platte filed a motion to allow payment of the proceeds into court. On April 23, the district court conducted a hearing on this motion at which each of the parties was represented in some manner, except for Greenwood. By order entered April 25, the court authorized FNB North Platte to pay proceeds of $25,232.42 to the court clerk and

held that "upon such payment [FNB North Platte] shall be dismissed as a party to the case." The order further provided, "Upon receipt of collected funds, the [court clerk] is authorized to pay [the Sheetses] the sum of $12,500.00 representing their [h]omestead [e]xemption claim, and upon such payment the [Sheetses] shall be dismissed." Trial of the remaining issues was set for May 15.

On April 25, 2007, Professional filed a motion for summary judgment. On May 7, FNB South Dakota filed a motion for summary judgment. On May 15, the district court conducted a hearing on the motions for summary judgment. By order entered on May 16, the court determined that FNB South Dakota's judgment had become dormant and ceased to be a lien upon the real estate, that one of Professional's judgment liens had first priority to the remaining proceeds, that Unifund's judgment lien had second priority and would exhaust the proceeds, and that no funds would be available regarding Professional's other judgment lien. The court sustained Professional's motion for summary judgment, overruled FNB South Dakota's motion for summary judgment, and directed the court clerk to disburse the remaining proceeds, part to Professional and the remainder to Unifund.

On June 7, 2007, FNB South Dakota filed its notice of appeal and deposited the statutory docket fee. On July 10, this court dismissed the appeal for lack of jurisdiction, citing Neb. Rev. Stat. § 25-1315 (Cum. Supp. 2006) and *Malolepszy v. State*, 270 Neb. 100, 699 N.W.2d 387 (2005), as authority supporting the dismissal. This court noted that there was "no final appealable order as to Greenwood . . . and [the Sheetses]." On July 20, FNB South Dakota filed a motion for rehearing accompanied by a brief, which we discuss below.

ASSIGNMENT OF ERROR

In its brief on rehearing, FNB South Dakota assigns that this court erred in summarily dismissing the appeal as not being taken from a final, appealable order.

STANDARD OF REVIEW

[1,2] For an appellate court to acquire jurisdiction of an appeal, there must be a final order entered by the court from

which the appeal is taken; conversely, an appellate court is without jurisdiction to entertain appeals from nonfinal orders. *Pfeil v. State*, 273 Neb. 12, 727 N.W.2d 214 (2007). A jurisdictional question which does not involve a factual dispute is determined by an appellate court as a matter of law. *Cumming v. Red Willow Sch. Dist. No. 179*, 273 Neb. 483, 730 N.W.2d 794 (2007).

ANALYSIS

Summary Dismissal.

This court's summary dismissal identified two jurisdictional issues. First, we observed that the April 25, 2007, order directed that the Sheetses were to be dismissed as defendants upon disbursement of their $12,500 homestead exemption. We viewed this as a conditional order and found in the record no subsequent order actually dismissing the Sheetses.

Second, we noted no disposition of Greenwood as a party to the case. The record shows that no process was ever served upon Greenwood; nor did Greenwood file a voluntary appearance or any pleading. We reasoned that under § 25-1315, an order or other form of decision, however designated, which adjudicated the rights and liabilities of fewer than all of the parties shall not terminate the action as to any of the parties, and the order or other form of decision is subject to revision at any time before the entry of judgment adjudicating the rights and liabilities of all of the parties. In other words, the order was interlocutory. We noted the decision of the Nebraska Supreme Court in *Malolepszy v. State, supra*, which interpreted § 25-1315 to require an explicit adjudication with respect to all claims and parties in the action. We digress to note that none of the orders in the district court purport to make the express determination that there is no just reason for delay, and the express direction for the entry of judgment, contemplated by § 25-1315(1).

Arguments for Rehearing.

In FNB South Dakota's brief in support of its motion for rehearing, FNB South Dakota argues that the "granting of summary judgment in favor of [Professional] was a final order that determined the rights to the remaining proceeds." Brief for appellant on motion for rehearing at 2. Relying upon Neb. Rev.

Stat. § 25-1902 (Reissue 1995), FNB South Dakota argues that "determining the allocation of the remaining proceeds affected a substantial right in all of the remaining parties because there was no money left to be dispersed [sic]." Brief for appellant on motion for rehearing at 3. FNB South Dakota reasons, "When the summary judgment was granted in favor of [Professional], the judgment was granted against all of the remaining parties, whether or not they filed a response or pleading contesting the judgment." *Id.* FNB South Dakota asserts that the Sheetses "were dismissed from the lawsuit." *Id.* at 4. It acknowledges that Greenwood "never filed an answer or participated in the proceedings." *Id.* It argues that the order granting summary judgment and determining to which parties the remaining funds were to be disbursed was a final, appealable order.

Nature of Interpleader.

[3-6] The answers to these jurisdictional questions depend upon the nature of an action in interpleader, a question infrequently discussed in Nebraska jurisprudence. Interpleader, although authorized by statute, is an equitable remedy whereby a disinterested stakeholder in possession of property claimed by two or more persons may require them to litigate the claims of each without embroiling him or her in the controversy. *Strasser v. Commercial Nat. Bank*, 157 Neb. 570, 60 N.W.2d 672 (1953). The claimants of the fund should be made parties to the proceeding. See *Burke Lumber & Coal Co. v. Anderson*, 162 Neb. 551, 76 N.W.2d 630 (1956). When two or more parties claim the ownership of a fund in the hands of a third, an action in equity may be maintained to recover the fund and to litigate and determine the ownership of it, and all persons claiming the fund are necessary and proper parties to the action. *Id.* When the determination of a controversy cannot be had without the presence of new parties to the suit, Neb. Rev. Stat. § 25-323 (Cum. Supp. 2006) directs the court to order them to be brought in. *Burke Lumber & Coal Co. v. Anderson, supra.*

Sheetses.

With these general principles in mind, we first turn to the resolution of the action against the Sheetses. Upon further

consideration, we determine that the April 25, 2007, order directing dismissal of the Sheetses upon payment of the sum of $12,500 represents no barrier to appellate jurisdiction. The order in our transcript bears the clerk's endorsement, dated April 26, 2007, reciting that a check for $12,500 was paid to the Sheetses and mailed to their attorney on that date.

[7] Generally, final judgments must not be conditional, and unless there is an equitable phase of the action wherein it is necessary to protect the interests of defendants, a conditional judgment is wholly void. *Lemburg v. Adams County*, 225 Neb. 289, 404 N.W.2d 429 (1987). We find the conditional judgment rule inapplicable for at least two reasons.

[8] First, in *Custom Fabricators v. Lenarduzzi*, 259 Neb. 453, 610 N.W.2d 391 (2000), the Nebraska Supreme Court explained that a conditional interlocutory order is not wholly void; rather, conditional orders have no force and effect as a final order or a judgment from which an appeal can be taken. Unlike the situation in *Malolepszy v. State*, 270 Neb. 100, 699 N.W.2d 387 (2005), where the trial court's order was silent concerning the disposition of a third-party claim, in the instant case, the trial court's April 25, 2007, order expressly disposed of the Sheetses' interest in the excess proceeds and directed that upon payment of that interest, they would be dismissed. To the extent that this order was conditional, the condition clearly was fulfilled on the next day after entry of the order.

[9] A conditional interlocutory order cannot mature into a final, appealable order without further court consideration regarding the task or obligation that was purportedly not met. *Custom Fabricators v. Lenarduzzi, supra*. The Nebraska Supreme Court explained that this is so because parties should not be left to guess or speculate as to the final effect of a conditional interlocutory order. In the instant case, however, the condition did not depend upon some future performance or nonperformance by one of the parties to the action; rather, it depended solely upon the performance of a ministerial act by a court official in execution of the express terms of the interlocutory order.

[10] In effect, the April 25, 2007, order represented a determination not that the Sheetses be dismissed, but that the Sheetses' interest in the excess proceeds was limited to $12,500 and

that their claims would be satisfied by the clerk's distribution. Whether a writing claimed to be a "judgment" is sufficient for that purpose depends more on its substance than its form. *Havelock Bank v. Woods*, 219 Neb. 57, 361 N.W.2d 197 (1985), *overruled on other grounds, Nielsen v. Adams*, 223 Neb. 262, 388 N.W.2d 840 (1986). The substance of the April 25 order determined the Sheetses' interest in the fund and the disposition of $12,500 of the fund.

[11] Second, in *Strunk v. Chromy-Strunk*, 270 Neb. 917, 708 N.W.2d 821 (2006), the Nebraska Supreme Court held that the void conditional judgment rule does not extend to actions in equity or to equitable relief granted within an action at law. As we observed at the outset, an action in interpleader is equitable in nature. Thus, the district court's April 25, 2007, order was not automatically void.

Thus, the court's action with respect to the Sheetses constitutes no barrier to appellate review. However, because of the situation concerning Greenwood, we nonetheless lack jurisdiction of the appeal.

Greenwood.

[12] The Nebraska Supreme Court has never determined whether an interpleader action constitutes an action in rem or in personam. FNB South Dakota argues that the court's May 16, 2007, order applied to Greenwood despite Greenwood's never having been served with process or making a voluntary appearance. This argument implicitly asserts that the action was in rem and that when the court determined the disposition of the fund, it rendered a final order as to all parties, even a party over which no personal jurisdiction had been obtained.

> In order to warrant an interpleader, the court must have jurisdiction of the subject matter in controversy, and of the parties making adverse claims to the subject matter. The court does not have jurisdiction over persons who are not parties to the proceeding, and jurisdiction in interpleader can only extend to the fund deposited in court and cannot embrace in personam jurisdiction on the issues of liability that go beyond the fund. However, where the court has jurisdiction of the subject matter of the suit, it may be

> entitled to decide issues relating to the res even though jurisdiction of the litigants cannot be obtained.

48 C.J.S. *Interpleader* § 21 at 114-15 (2004).

We reject FNB South Dakota's argument relating to Greenwood for at least two reasons. First, the decision in *Burke Lumber & Coal Co. v. Anderson*, 162 Neb. 551, 76 N.W.2d 630 (1956), suggests that the Nebraska Supreme Court would treat an equitable proceeding in interpleader as an action in personam or, at least, not as one purely in rem. The court stated:

> "When two or more parties claim the ownership of a fund in the hands of a third, an action in equity may be maintained to recover the fund and to litigate and determine the ownership of it, and all persons claiming the fund are necessary and proper parties to the action."

Id. at 561, 76 N.W.2d at 637-38, quoting *Conservative Savings & Loan Ass'n v. City of Omaha*, 73 Neb. 720, 103 N.W. 286 (1905). FNB North Platte alleged that Greenwood has an interest in the property. If, as the *Burke Lumber & Coal Co.* decision suggests, Greenwood is a necessary party, the action could not proceed without Greenwood.

Second, FNB North Platte has already determined to make Greenwood a party. By filing the action naming Greenwood as a defendant, FNB North Platte commenced the action against Greenwood. See Neb. Rev. Stat. § 25-217 (Cum. Supp. 2006). Although under § 25-217, the action stands dismissed without prejudice as to any defendant not served within 6 months from the date the complaint was filed, the 6-month period was still running at the time of the May 16, 2007, order. As of May 16, Greenwood remained a party—even though the district court had not acquired personal jurisdiction over that party. Because FNB North Platte's complaint was filed on January 3, as of the date of FNB South Dakota's attempt to appeal to this court, Greenwood remained a party which had not been subjected to personal jurisdiction. The district court had no power to make a final judgment, which would necessarily affect Greenwood's interest in the property, while Greenwood remained a party but was not subject to the court's personal jurisdiction.

Under the general authority quoted above, it may be possible to proceed where personal jurisdiction over a defendant cannot

be obtained. However, on the state of the record before us, there is no basis to state that personal jurisdiction over Greenwood could not have been obtained. The record shows no attempt to effect service of process upon Greenwood, and it has not entered any voluntary appearance. We cannot assume from a silent record that personal jurisdiction over Greenwood could not be obtained.

CONCLUSION

At the time of filing of FNB South Dakota's notice of appeal, Greenwood remained a party to the interpleader action, and its interests had not been, and could not have been, determined by the district court's May 16, 2007, order. Thus, the district court's order was not final because it did not finally determine the rights of all parties to the action. This court lacks jurisdiction over this appeal and properly dismissed the appeal.

MOTION FOR REHEARING OVERRULED.

KELLY S. THOMSEN, APPELLEE, V. NEBRASKA DEPARTMENT OF MOTOR VEHICLES, APPELLANT.

741 N.W.2d 682

Filed October 23, 2007. No. A-05-1570.

1. **Administrative Law: Judgments: Appeal and Error.** A judgment or final order rendered by a district court in a judicial review pursuant to the Administrative Procedure Act may be reversed, vacated, or modified by an appellate court for errors appearing on the record. When reviewing an order of a district court under the Administrative Procedure Act for errors appearing on the record, the inquiry is whether the decision conforms to the law, is supported by competent evidence, and is neither arbitrary, capricious, nor unreasonable.
2. **Statutes: Appeal and Error.** Statutory interpretation is a question of law, which an appellate court resolves independently of the trial court.
3. **Administrative Law: Drunk Driving: Licenses and Permits: Revocation: Police Officers and Sheriffs: Blood, Breath, and Urine Tests: Time.** Neb. Rev. Stat. § 60-498.01(3) (Reissue 2004) provides that the arresting peace officer shall within 10 days forward to the director a sworn report stating (a) that the person was arrested as described in Neb. Rev. Stat. § 60-6,197(2) (Reissue 2004) and the reasons for such arrest, (b) that the person was requested to submit to the required test, and (c) that the person submitted to a test, the type of test to which he or she submitted, and that such test revealed the presence of alcohol in a concentration specified in Neb. Rev. Stat. § 60-6,196 (Reissue 2004).

4. **Administrative Law: Jurisdiction: Motor Vehicles: Licenses and Permits: Revocation.** Technical deficiencies in a sworn report do not defeat administrative jurisdiction.
5. ____: ____: ____: ____: ____. In determining the point at which an omission on a sworn report becomes a jurisdictional defect, the test should be whether, notwithstanding the omission, the sworn report conveys the information required by the applicable statute.
6. **Administrative Law: Drunk Driving: Licenses and Permits: Revocation: Time.** The 10-day time limit set forth in Neb. Rev. Stat. § 60-498.01(3) (Reissue 2004) is directory rather than mandatory.

Appeal from the District Court for Dodge County: JOHN E. SAMSON, Judge. Reversed and remanded with directions.

Jon Bruning, Attorney General, and Edward G. Vierk for appellant.

Adam J. Sipple, of Johnson & Mock, for appellee.

SIEVERS, CARLSON, and CASSEL, Judges.

CASSEL, Judge.

INTRODUCTION

The district court for Dodge County reversed the administrative revocation of Kelly S. Thomsen's motor vehicle operator's license because the Nebraska Department of Motor Vehicles (DMV) did not receive the sworn report from the arresting officer within the statutory time limit—10 days from the date of arrest. DMV appeals. We determine that the statutory time limit is directory rather than mandatory and reverse the judgment below.

BACKGROUND

We limit our recitation of facts to those relevant to the narrow issue presented. On July 8, 2005, a Nebraska State Patrol officer arrested Thomsen for driving under the influence of alcohol. After observing the result of a breath test administered by a local corrections officer, the arresting officer completed a sworn report; signed the report in the presence of a notary public; read the verbal notice portion of the report, which notified Thomsen that his operator's license would automatically be revoked 30 days after the date of his arrest but that he had

the right to contest the revocation; gave Thomsen a copy of a temporary license; and "cause[d] the original . . . to be sent to [DMV]." DMV received the sworn report on July 19. On cross-examination during an administrative license revocation (ALR) hearing, the arresting officer admitted that he had no explanation for why DMV did not receive the report within 10 days of the arrest. He testified that he "had to submit [the sworn report] to a supervisor" on the night of the arrest and admitted that he "d[id]n't know what happened from there."

After the ALR hearing, the director of DMV revoked Thomsen's operator's license and privilege to operate a motor vehicle in the State of Nebraska for 90 days. Thomsen challenged the revocation in the district court.

Relying upon two decisions of the Nebraska Supreme Court, which decisions we discuss in the analysis section below, the district court concluded that the arresting officer "must strictly comply with the requirements of [Neb. Rev. Stat.] § 60-498.01 [(Reissue 2004)]." The court concluded, "Due to the fact that the [d]irector of [DMV] did not timely receive the arresting officer's sworn report, . . . the final decision of the [d]irector was not supported by competent evidence and the revocation should be reversed."

DMV timely appeals.

ASSIGNMENT OF ERROR

We consolidate DMV's three assignments of error to one: The district court erred in determining that because DMV did not receive the sworn report within 10 days of the date of arrest, the revocation must be reversed.

STANDARD OF REVIEW

[1] A judgment or final order rendered by a district court in a judicial review pursuant to the Administrative Procedure Act may be reversed, vacated, or modified by an appellate court for errors appearing on the record. When reviewing an order of a district court under the Administrative Procedure Act for errors appearing on the record, the inquiry is whether the decision conforms to the law, is supported by competent evidence, and is neither arbitrary, capricious, nor unreasonable. *Chase 3000,*

Inc. v. Nebraska Pub. Serv. Comm., 273 Neb. 133, 728 N.W.2d 560 (2007).

[2] Statutory interpretation is a question of law, which an appellate court resolves independently of the trial court. *Burns v. Nielsen*, 273 Neb. 724, 732 N.W.2d 640 (2007).

ANALYSIS

[3] Neb. Rev. Stat. § 60-498.01(3) (Reissue 2004) pertains to arrests of motorists who submit to a chemical test that discloses the presence of alcohol. Section 60-498.01(3) states, in pertinent part:

> The arresting peace officer shall within ten days forward to the director a sworn report stating (a) that the person was arrested as described in subsection (2) of section 60-6,197 and the reasons for such arrest, (b) that the person was requested to submit to the required test, and (c) that the person submitted to a test, the type of test to which he or she submitted, and that such test revealed the presence of alcohol in a concentration specified in section 60-6,196.

In *Forgey v. Nebraska Dept. of Motor Vehicles*, 15 Neb. App. 191, 724 N.W.2d 828 (2006), this court held that the 10-day time limit set forth in § 60-498.01(2), which addresses license revocations of motorists who refuse to submit to a chemical test of their blood, breath, or urine, is directory rather than mandatory. Thus, the violation of such time limit did not invalidate the ALR proceedings. The 10-day time limit set forth in § 60-498.01(2) is similar to the time limit in § 60-498.01(3) set forth above. DMV contends that our decision in *Forgey* controls the result of the case before us.

Thomsen does not attempt to distinguish the instant case from *Forgey* based on the differences between § 60-498.01(2) and (3). He contends that the decisions of the Nebraska Supreme Court in *Hahn v. Neth*, 270 Neb. 164, 699 N.W.2d 32 (2005), and *Arndt v. Department of Motor Vehicles*, 270 Neb. 172, 699 N.W.2d 39 (2005), contradict our decision in *Forgey* and support the district court's decision in the instant case. We observe that the district court's decision came before the release of our opinion in *Forgey*.

DMV also argues that § 60-498.01(3) does not require that DMV *receive* the report within 10 days of arrest, but, rather, that the arresting officer "*forward*" the report within that time. Brief for appellant at 10. DMV argues that its receipt of the report on the 11th day "gives rise to the logical inference that the sworn report was forwarded . . . no later than [the 10th day after the arrest]." *Id.* at 11. However, there is no evidence in the record of the means used to transport the sworn report. An equally logical inference is that some person, either the arresting officer's supervisor or another person, personally delivered the sworn report to DMV on the date of receipt and after the expiration of the 10-day period. We therefore turn to an examination of the cases upon which Thomsen relies.

In *Arndt v. Department of Motor Vehicles, supra*, the first law enforcement officer on the scene conducted the traffic stop; observed the motorist's intoxication; conducted the field sobriety tests, including a preliminary breath test; and placed the motorist under arrest. The law enforcement officer who submitted the sworn report arrived after the arrest to transport the motorist to the county jail and observe the administration of a breath test. Because the second officer was not present at the scene of the arrest for purposes of assisting in it, the *Arndt* court determined that the sworn report had not been submitted by the "arresting peace officer" within the meaning of § 60-498.01(3). In the case before us, the arresting peace officer was the person who completed and submitted the sworn report. Thus, the *Arndt* decision provides no answer to the specific question before us. The other case cited by Thomsen, however, does address principles which apply to the instant case.

In *Hahn v. Neth, supra*, the arresting peace officer neglected to indicate in the sworn report whether the chemical test administered was of the motorist's blood or breath. The *Hahn* court noted the express requirement of the then-effective statute that the sworn report state the type of test to which the motorist submitted. The court affirmed the district court's determination that the director of DMV did not acquire jurisdiction to administratively revoke the motorist's operator's license. Thomsen's argument seems to rely upon the court's statement that "'when the applicable rules and regulations are not strictly complied

with, [DMV] cannot obtain the benefit of a presumption that all facts recited in the sworn report are true.'" *Hahn v. Neth*, 270 Neb. 164, 168-69, 699 N.W.2d 32, 37 (2005), quoting *Morrissey v. Department of Motor Vehicles*, 264 Neb. 456, 647 N.W.2d 644 (2002).

[4,5] Significantly, however, the *Hahn* court also stated that "technical deficiencies in the sworn report do not defeat administrative jurisdiction." 270 Neb. at 170, 699 N.W.2d at 38. The court recognized the difficulty in defining the point at which an omission on a sworn report becomes a jurisdictional defect, as opposed to a technical one. The court concluded that "the test should be whether, notwithstanding the omission, the sworn report conveys the information required by the applicable statute." *Id*. at 171, 699 N.W.2d at 38.

In the case before us, the sworn report admittedly contains all of the required information. Thomsen's jurisdictional claim relies solely upon the time component of the statute. In *Forgey v. Nebraska Dept. of Motor Vehicles*, 15 Neb. App. 191, 724 N.W.2d 828 (2006), this court concluded that the time limitation in § 60-498.01(2) was not essential to the main objective of the ALR statutes, which objective is to protect the public from the health and safety hazards of drunk driving by quickly getting offenders off the road. We set forth a lengthy exposition of the law used to determine whether a statutory provision is mandatory or directory. The reasoning in *Forgey* is equally applicable to the time limitation in § 60-498.01(3).

Finally, Thomsen quarrels with our determination in *Forgey* that there is no sanction attached to an arresting officer's failure to file the sworn report with DMV within 10 days. He relies upon § 60-498.01(5)(a), which states:

> If the results of a chemical test indicate the presence of alcohol in a concentration specified in section 60-6,196, the results are not available to the arresting peace officer while the arrested person is in custody, and the notice of revocation has not been served as required by subsection (4) of this section, the peace officer shall forward to the director a sworn report containing the information prescribed by subsection (3) of this section within ten days after receipt of the results of the chemical test. If the sworn

> report is not received within ten days, the revocation shall not take effect.

The last sentence of § 60-498.01(5)(a) clearly modifies only the preceding sentence and does not apply to the other subsections. DMV argues, and we agree, that under § 60-498.01(5)(a), motorists do not receive notice at the time of arrest of the intention to confiscate and revoke, in contrast to the notice provided to motorists in situations controlled by § 60-498.01(3). DMV concedes that sound policy reasons exist for requiring the time provision of § 60-498.01(5)(a) to be mandatory. Thomsen provides no such reasons to support his argument regarding § 60-498.01(3).

CONCLUSION

[6] We hold that the 10-day time limit set forth in § 60-498.01(3) is directory rather than mandatory. The district court erred in determining that the violation of the time limit invalidated Thomsen's ALR proceedings. We reverse the judgment of the district court and remand the cause to that court with directions to reinstate the administrative revocation of Thomsen's operator's license.

REVERSED AND REMANDED WITH DIRECTIONS.

STATE OF NEBRASKA, APPELLEE, V.
MICHAEL G. VEATCH, APPELLANT.
740 N.W.2d 817

Filed October 23, 2007. No. A-06-738.

1. **Jurisdiction: Appeal and Error.** Before reaching the legal issues presented for review, it is the power and duty of an appellate court to determine whether it has jurisdiction over the matter before it, irrespective of whether the issue is raised by the parties.
2. **Jurisdiction: Final Orders: Appeal and Error.** For an appellate court to acquire jurisdiction of an appeal, there must be a final judgment or final order entered by the tribunal from which the appeal is taken.
3. **Constitutional Law: Statutes: Jurisdiction: Time: Appeal and Error.** The appellate jurisdiction of a court is contingent upon timely compliance with constitutional or statutory methods of appeal.

4. **Judgments: Time: Appeal and Error.** Neb. Rev. Stat. § 25-1912(1) (Cum. Supp. 2006) specifies that proceedings to obtain appellate review require the filing of a notice of appeal within 30 days after the entry of judgment.
5. **Criminal Law: Judgments: Appeal and Error.** For purposes of appeal in a criminal case, the judgment occurs when the verdict and sentence are rendered by the court.
6. **Motions for New Trial: Time.** A motion for new trial does not toll the running of the 30-day jurisdictional requirement of Neb. Rev. Stat. § 25-1912 (Cum. Supp. 2006).
7. **Criminal Law: Motions for New Trial: Time: Appeal and Error.** The filing of a motion for new trial has no effect on the jurisdictional requirement that in a criminal action, an appealing party must file a notice of appeal within 30 days after the date of judgment.
8. **Criminal Law: Motions for New Trial: Appeal and Error.** In a criminal case, errors assigned by a defendant based on the overruling of a timely filed motion for new trial may be assigned as error in a properly perfected direct appeal from the judgment.
9. **Rules of Evidence: Other Acts.** Neb. Evid. R. 404(2) is an inclusionary rule permitting the use of relevant, specific acts for all purposes except to prove character of a person in order to show that such person acted in conformity with character. Thus, rule 404(2) permits evidence of other acts if such acts are relevant for any purpose other than to show a defendant's propensity or disposition to commit the crime charged.
10. ____: ____. Proof of other acts admissible under Neb. Evid. R. 404(2) is not restricted to those acts occurring before the event for which a defendant is prosecuted; proof of other acts is admissible even if such acts occurred after the offense charged against the defendant.
11. ____: ____. The admissibility of evidence under Neb. Evid. R. 404(2) must be determined upon the facts of each case and is within the discretion of the trial court.
12. **Trial: Evidence.** Where objects pass through several hands before being produced in court, it is necessary to establish a complete chain of evidence, tracing the possession of the object or article to the final custodian; and if one link in the chain is missing, the object may not be introduced in evidence.
13. ____: ____. Objects which relate to or explain the issues or form a part of a transaction are admissible in evidence only when duly identified and shown to be in substantially the same condition as at the time in issue.
14. **Trial: Evidence: Appeal and Error.** An appellate court's review concerning the admissibility of evidence comprising objects which relate to or explain the issues or form a part of a transaction is for an abuse of discretion.
15. **Trial: Evidence.** An exhibit is admissible, so far as identity is concerned, when it has been identified as being the same object about which the testimony was given. It must also be shown to the satisfaction of the trial court that no substantial change has taken place in the exhibit so as to render it misleading. As long as the article can be identified, it is immaterial in how many or in whose hands it has been.

16. ____: ____. Important in determining the chain of custody are the nature of the evidence, the circumstances surrounding its preservation and custody, and the likelihood of intermeddlers' tampering with the object.
17. **Trial: Evidence: Proof.** Proof that an exhibit remained in the custody of law enforcement officials is sufficient to prove a chain of possession and is sufficient foundation to permit its introduction into evidence.
18. **Trial: Evidence.** A defendant's challenge to the chain of custody goes to the weight to be given to the evidence presented rather than to the admissibility of that evidence.
19. **Criminal Law: Trial: Evidence: Notice: Time.** A defendant is precluded from offering evidence for the purpose of establishing an alibi to an offense unless notice of intention to rely upon an alibi is given to the county attorney and filed with the court at least 30 days before trial.
20. **Criminal Law: Evidence: Proof.** To establish an alibi defense, a defendant must show (1) he was at a place other than where the crime was committed, and (2) he was at such other place such a length of time that it was impossible for him to have been at the place where and when the crime was committed.
21. **Convictions: Evidence: Appeal and Error.** Regardless of whether the evidence is direct, circumstantial, or a combination thereof, and regardless of whether the issue is labeled as a failure to direct a verdict, insufficiency of the evidence, or failure to prove a prima facie case, the standard is the same: In reviewing a criminal conviction, an appellate court does not resolve conflicts in the evidence, pass on the credibility of witnesses, or reweigh the evidence; such matters are for the finder of fact, and a conviction will be affirmed, in the absence of prejudicial error, if the evidence admitted at trial, viewed and construed most favorably to the State, is sufficient to support the conviction.
22. **Criminal Law: Words and Phrases.** A person commits terroristic threats if he or she threatens to commit any crime of violence with the intent to terrorize another or in reckless disregard of the risk of causing such terror.
23. **Motions for Mistrial: Appeal and Error.** The decision whether to grant a motion for mistrial is within the discretion of the trial court and will not be disturbed on appeal in the absence of an abuse of discretion.
24. **Trial: Juries.** A jury may be discharged by the court on account of the sickness of a juror, or other accident or calamity requiring its discharge, or by consent of both parties, or after it has been kept together until it satisfactorily appears that there is no probability of its reaching an agreement.

Appeal from the District Court for Jefferson County: PAUL W. KORSLUND, Judge. Affirmed.

Lyle Joseph Koenig, of Koenig Law Firm, for appellant.

Jon Bruning, Attorney General, and George R. Love for appellee.

IRWIN, SIEVERS, and CASSEL, Judges.

IRWIN, Judge.

I. INTRODUCTION

Michael G. Veatch appeals his conviction and the sentence imposed by the district court for Douglas County on a charge of terroristic threats and the district court's overruling of Veatch's motion for new trial. Veatch challenges a number of the court's evidentiary rulings, the sufficiency of the evidence to support the conviction, and the court's denial of a motion for mistrial. We find that only the issues raised in Veatch's motion for new trial have been timely appealed, and we find no merit to Veatch's assignments of error. We affirm.

II. BACKGROUND

On March 23, 2005, the State filed an information charging Veatch with conspiracy to commit first degree murder. On November 17, the State filed a second amended information charging Veatch instead with terroristic threats. The charge was based on an allegation that Veatch, in October 2003, hired another man, Cameron Warner, to copy or rewrite and deliver a letter that Veatch and his father authored threatening Veatch's wife, who had recently moved out of the marital home and filed for divorce.

On December 8, 2005, the State filed a motion requesting a hearing pursuant to Neb. Evid. R. 404 and a ruling on "the admissibility of evidence concerning other crimes, wrongs or acts committed by [Veatch]." See rule 404(3). On January 5, 2006, the court conducted a hearing on the State's motion. Relevant to this appeal, the State presented evidence concerning statements made by Veatch to Warner in February 2005 that Veatch wanted Warner "to shave her [head] and . . . mess her face up so no one else would want her." On February 8, 2006, the court ruled that the testimony concerning Veatch's statements to Warner was admissible to demonstrate intent, "as well as to counter any argument advanced by [Veatch] that th[e] note was a joke or part of some sort of misunderstanding."

On March 16, 2006, the jury returned a verdict of guilty on the charge of terroristic threats. On March 17, Veatch filed a motion for new trial. On May 18, the court sentenced Veatch.

On June 14, the court overruled Veatch's motion for new trial. This appeal followed.

III. ASSIGNMENTS OF ERROR

Veatch has assigned seven errors on appeal, which we consolidate for discussion to five. First, Veatch asserts that the district court erred in allowing the State to present rule 404 evidence. Second, Veatch asserts that the district court erred in admitting the letter delivered to his wife over Veatch's chain of custody objection. Third, Veatch asserts that the district court erred in excluding certain testimony as alibi evidence. Fourth, Veatch asserts that there was insufficient evidence to support a conviction. Fifth, Veatch asserts that the district court erred in denying Veatch's motion for mistrial during jury deliberations.

IV. ANALYSIS

1. Jurisdictional Issue

Before addressing Veatch's assignments of error, we are compelled to resolve a jurisdictional matter that is raised by Veatch's appeal. As noted above, Veatch did not file a timely appeal from the entry of judgment, but, rather, waited to appeal until after the district court ruled on his motion for new trial. As such, we must initially determine what issues have been properly preserved for appellate review.

[1,2] Before reaching the legal issues presented for review, it is the power and duty of an appellate court to determine whether it has jurisdiction over the matter before it, irrespective of whether the issue is raised by the parties. *Chase 3000, Inc. v. Nebraska Pub. Serv. Comm.*, 273 Neb. 133, 728 N.W.2d 560 (2007). See *State v. Hudson*, 273 Neb. 42, 727 N.W.2d 219 (2007). For an appellate court to acquire jurisdiction of an appeal, there must be a final judgment or final order entered by the tribunal from which the appeal is taken. *State v. Hudson, supra*.

[3-5] The appellate jurisdiction of a court is contingent upon timely compliance with constitutional or statutory methods of appeal. *State v. Hess*, 261 Neb. 368, 622 N.W.2d 891 (2001). Neb. Rev. Stat. § 25-1912(1) (Cum. Supp. 2006) specifies that proceedings to obtain appellate review require the filing of a

notice of appeal "within thirty days after the entry of . . . judgment." For purposes of appeal in a criminal case, the judgment occurs when the verdict and sentence are rendered by the court. *State v. Hess, supra*.

[6,7] A motion for new trial does not toll the running of the 30-day jurisdictional requirement of § 25-1912. *State v. Nash*, 246 Neb. 1030, 524 N.W.2d 351 (1994), *abrogated on other grounds, State v. Thomas*, 262 Neb. 985, 637 N.W.2d 632 (2002). The filing of a motion for new trial has no effect on the jurisdictional requirement that in a criminal action, an appealing party must file a notice of appeal within 30 days after the date of judgment. See *State v. Flying Hawk*, 227 Neb. 878, 420 N.W.2d 323 (1988).

[8] In a criminal case, errors assigned by the defendant based on the overruling of a timely filed motion for new trial may be assigned as error in a properly perfected direct appeal from the judgment. *State v. Thomas, supra*. In *State v. Thomas*, the Nebraska Supreme Court expressly disavowed any interpretation of prior cases that suggested that errors based on the overruling of a motion for new trial could not be included in a properly perfected direct appeal. The Supreme Court did not, however, overrule the proposition that a motion for new trial does not toll the time to perfect a direct appeal from the judgment or the proposition that when a defendant appeals only from the overruling of a motion for new trial, the issues on appeal are limited to those properly presented in the motion for new trial. See *State v. McCormick and Hall*, 246 Neb. 271, 518 N.W.2d 133 (1994), *abrogated in part, State v. Thomas, supra*.

In the present case, Veatch failed to properly perfect a direct appeal from the judgment. Veatch filed no notice of appeal from the judgment and only appealed from the overruling of his motion for new trial. In such a situation, the issues on appeal are limited to those properly presented in the motion for new trial. See *State v. McCormick and Hall, supra*. In *State v. Thomas, supra*, the defendant was granted a new direct appeal in a postconviction proceeding and the Nebraska Supreme Court considered both issues related to the judgment and issues related to the overruling of the defendant's motion for new trial. In the present case, Veatch only appealed from the overruling of his motion for

new trial and did not properly perfect a direct appeal. As such, only the issues properly preserved in Veatch's motion for new trial are properly before us on appeal.

2. Rule 404 Evidence

The first issue raised by Veatch is whether the district court erred in finding that the State's proffered evidence concerning Veatch and Warner's contact in February 2005, more than 15 months after the alleged terroristic threat, was admissible under rule 404. We find no abuse of discretion by the court in receiving this testimony.

[9-11] Rule 404(2) is an inclusionary rule permitting the use of relevant, specific acts for all purposes except to prove character of a person in order to show that such person acted in conformity with character. *State v. Stewart*, 219 Neb. 347, 363 N.W.2d 368 (1985). Thus, rule 404(2) permits evidence of other acts if such acts are relevant for any purpose other than to show a defendant's propensity or disposition to commit the crime charged. *Id.* Proof of other acts admissible under rule 404(2) is not restricted to those acts occurring before the event for which a defendant is prosecuted; proof of other acts is admissible even if such acts occurred after the offense charged against the defendant. See *id*. The admissibility of evidence under rule 404(2) must be determined upon the facts of each case and is within the discretion of the trial court. *State v. Wisinski*, 268 Neb. 778, 688 N.W.2d 586 (2004).

In the present case, the testimony that Veatch and Warner met and that during that meeting, Veatch told Warner that Veatch wanted his wife's head shaven and her face "messed up," was presented not to show that it was in Veatch's character to terroristically threaten, but to show that he intended to terrorize Veatch's wife and that the previous incident—the charged incident—was not a mistake or joke. We find no abuse of discretion by the district court in allowing this testimony.

Additionally, the district court specifically instructed the jury, prior to the testimony's being received, that the testimony was being received for a limited purpose. The receipt of this evidence did not suggest a decision on an improper basis, and its receipt did not violate Neb. Evid. R. 403. See *State v. Myers*,

15 Neb. App. 308, 726 N.W.2d 198 (2006). As such, we find no merit to this assignment of error.

3. Chain of Custody

The next issue raised by Veatch is whether the district court erred in overruling Veatch's chain of custody objection to the State's proffer of the letter that constituted the terroristic threat. We find that the State adduced evidence that the letter was the same letter allegedly delivered by Warner to Veatch's wife and that the letter was in the custody of law enforcement. Any remaining issues concerning the chain of custody go to the weight of the evidence, not its admissibility.

[12-14] Where objects pass through several hands before being produced in court, it is necessary to establish a complete chain of evidence, tracing the possession of the object or article to the final custodian; and if one link in the chain is missing, the object may not be introduced in evidence. *State v. Tolliver*, 268 Neb. 920, 689 N.W.2d 567 (2004). It is elementary that objects which relate to or explain the issues or form a part of a transaction are admissible in evidence only when duly identified and shown to be in substantially the same condition as at the time in issue. *Id.* Our review concerning the admissibility of this evidence is for an abuse of discretion. See *id.*

[15,16] An exhibit is admissible, so far as identity is concerned, when it has been identified as being the same object about which the testimony was given. *State v. Sexton*, 240 Neb. 466, 482 N.W.2d 567 (1992). It must also be shown to the satisfaction of the trial court that no substantial change has taken place in the exhibit so as to render it misleading. *Id.* As long as the article can be identified, it is immaterial in how many or in whose hands it has been. *Id.* Important in determining the chain of custody are the nature of the evidence, the circumstances surrounding its preservation and custody, and the likelihood of intermeddlers' tampering with the object. *State v. Tolliver, supra*.

[17,18] Proof that an exhibit remained in the custody of law enforcement officials is sufficient to prove a chain of possession and is sufficient foundation to permit its introduction into evidence. *State v. Mather*, 264 Neb. 182, 646 N.W.2d 605 (2002).

Further, the Nebraska Supreme Court has held that a defendant's challenge to the chain of custody goes to the weight to be given to the evidence presented rather than to the admissibility of that evidence. See *State v. Bradley*, 236 Neb. 371, 461 N.W.2d 524 (1990).

In this case, Warner identified the letter as the letter he had written at the direction of Veatch. The victim, Veatch's wife, identified the letter as the letter containing a threat that she received. A police officer identified the letter as the letter he received from Veatch's wife when she brought the letter to law enforcement's attention and testified that he had "tagged" it into evidence. There is nothing in the record to indicate that the letter had been tampered with, beyond being tested for fingerprints and for handwriting analysis. We find no abuse of discretion by the district court in receiving the letter into evidence over Veatch's chain of custody objection. This assignment of error is without merit.

4. Alibi Evidence

The next issue raised by Veatch on appeal is whether the district court erred in excluding certain testimony at trial as alibi evidence proffered without Veatch's having given the State adequate notice of his intent to present alibi evidence. Because we find that the proffered evidence was alibi evidence, we find no merit to Veatch's assertion of error.

[19,20] Pursuant to Neb. Rev. Stat. § 29-1927 (Reissue 1995), a defendant is precluded from offering evidence for the purpose of establishing an alibi to an offense unless notice of intention to rely upon an alibi is given to the county attorney and filed with the court at least 30 days before trial. To establish an alibi defense, a defendant must show (1) he was at a place other than where the crime was committed, and (2) he was at such other place such a length of time that it was impossible for him to have been at the place where and when the crime was committed. *State v. Moreno*, 228 Neb. 210, 422 N.W.2d 56 (1988); *State v. Jacobs*, 226 Neb. 184, 410 N.W.2d 468 (1987).

In the present case, Veatch attempted to adduce evidence that he was present at his father's home at the time Warner claims Veatch and his father hired him to copy the threatening letter

to Veatch's wife, but that he was there only briefly and that he left immediately upon seeing Warner. The State objected to this proffered evidence as being alibi evidence for which Veatch had not provided the statutorily required notice, and the court sustained the objection.

On appeal, Veatch argues that the proffered evidence was not alibi evidence. We disagree. Veatch was attempting to present evidence that he left the scene and was, accordingly, at some place other than where the crime was committed and that he was not present for a sufficient time to have committed the crime. Although perhaps untypical, this evidence was alibi evidence, and the trial court committed no error in sustaining the State's objections. This assignment of error is without merit.

5. Sufficiency of Evidence

The next issue raised by Veatch is whether there was sufficient evidence to sustain a conviction for terroristic threats. Veatch has raised this issue by challenging the district court's denial of Veatch's motions to dismiss and by specifically challenging the sufficiency of the evidence to sustain the conviction. We find that the properly admitted evidence, viewed and construed most favorably to the State, is sufficient to support the conviction.

[21] Regardless of whether the evidence is direct, circumstantial, or a combination thereof, and regardless of whether the issue is labeled as a failure to direct a verdict, insufficiency of the evidence, or failure to prove a prima facie case, the standard is the same: In reviewing a criminal conviction, an appellate court does not resolve conflicts in the evidence, pass on the credibility of witnesses, or reweigh the evidence; such matters are for the finder of fact, and a conviction will be affirmed, in the absence of prejudicial error, if the evidence admitted at trial, viewed and construed most favorably to the State, is sufficient to support the conviction. *State v. White*, 272 Neb. 421, 722 N.W.2d 343 (2006).

[22] Neb. Rev. Stat. § 28-311.01 (Reissue 1995) provides, in relevant part, that a person commits terroristic threats if he or she threatens to commit any crime of violence with the intent to terrorize another or in reckless disregard of the risk of causing such terror. Section 28-311.01 requires neither an actual intent

to execute the threats made nor that the recipient of the threats actually be terrorized. See *State v. Saltzman*, 235 Neb. 964, 458 N.W.2d 239 (1990).

In this case, the State adduced evidence establishing the following: Veatch's wife left the marital home in June 2003 and filed for divorce in July 2003. Veatch was angry about the divorce and wanted custody of his and his wife's two children. On October 26, 2003, Warner went to Veatch's father's house and had a conversation with Veatch and Veatch's father. Veatch "was complaining about his wife at that time, how she kept sleeping around on him and she wasn't no good." Veatch "said he wished he knew of a way to get rid of her, because she was a problem to him." Veatch dictated as his father wrote a letter to Veatch's wife. Veatch told his father to include information in the letter about "where [Veatch's wife] was from and that she had written off some dope dealers in another state or something, and that they had followed her down here, and that they were going to kill her if she didn't make things right back there where she was from." Veatch asked Warner to rewrite the letter in Warner's handwriting, which Warner did. Warner "was told to put [the letter] inside [Veatch's wife's car], put it under the windshield wiper, put it under the gas tank or put it in her mail box." Warner placed the letter inside Veatch's wife's gas tank compartment. Veatch's wife found the letter when getting gas, read the letter, "was pretty scared" that "somebody was going to hurt [her]," and delivered the letter to law enforcement.

The letter was received at trial. The letter is as follows:

> Its been a few years and at last weve found you, I dont fuckin appreciate having to travel al this way to not find you at your address on C street you still have an obligation to us. Im giving you one chance to make this right you left from Renton in a hurry
>
> Ive been hired to just fuck you off but after my trip to Rapid City I found out you now have children usually in a situation like this I wouldnt give a fuck I was ordered to stay in your area until your obligation has been meant.
>
> I will see you soon. You can run again and this time I will be forced to either burry your ass or bring you back to washington its your Desicion is yours.

The above evidence, viewed in a light most favorable to the State, establishes that Veatch threatened to commit a crime of violence with the intent to terrorize his wife or in reckless disregard of the risk of causing such terror. See § 28-311.01. There is no merit to Veatch's assertions to the contrary.

6. Motion for Mistrial

The final issue raised by Veatch is whether the district court erred in overruling Veatch's motion for mistrial "and permitting the jury to be separate and apart for a period of six days." Brief for appellant at 3. This issue concerns the fact that one of the jurors became ill and was hospitalized briefly during the jury's deliberations, causing the jury to be adjourned for several days before reconvening and reaching a guilty verdict. Veatch moved for a mistrial at the beginning of the delay and did not renew the motion at any time during the delay. We do not find that the district court abused its discretion in denying the motion for mistrial at the time it was made.

[23,24] The decision whether to grant a motion for mistrial is within the discretion of the trial court and will not be disturbed on appeal in the absence of an abuse of discretion. *State v. Gutierrez*, 272 Neb. 995, 726 N.W.2d 542 (2007); *State v. Floyd*, 272 Neb. 898, 725 N.W.2d 817 (2007). Pursuant to Neb. Rev. Stat. § 25-1117 (Reissue 1995), a jury may be discharged by the court on account of the sickness of a juror, or other accident or calamity requiring its discharge, or by consent of both parties, or after it has been kept together until it satisfactorily appears that there is no probability of its reaching an agreement.

In the present case, trial concluded on Friday, March 10, 2006, and the court specifically asked the parties if there was any objection to the jury's being instructed that if it had not reached a verdict by 6 p.m., it would adjourn for the weekend and return to finish deliberations on the following Monday morning. There was no objection. The case was submitted to the jury for deliberation at 12:05 p.m., the jury did not reach a verdict, and the jury was adjourned for the weekend.

On the following Monday morning, the court was informed that one of the jurors had been hospitalized. The State represented to the court that it had been informed the juror would not

be available for deliberations on that Monday and that it was awaiting further news concerning whether the juror would be able to return for deliberations the next day. Veatch then moved for a mistrial or for discharge of the jury pursuant to § 25-1117. The court ruled that it was "premature to conclude that the delay in deliberations, because of the illness of the juror, [was] a sufficient problem to warrant a mistrial" at that point in time. The court stated, "At this point, we just don't know if the jury can resume deliberations tomorrow or not." The court then ordered the jury to reconvene the next day.

The next day, Tuesday, the court was informed that the hospitalized juror would not be available that day or Wednesday, but would possibly be available to resume deliberations on Thursday. Veatch's counsel indicated to the court that he had reduced his motion for mistrial to writing and submitted a brief in support of the motion. The court addressed the available members of the jury and inquired whether the passage of time was presenting "a problem in terms of memory" for any of the jury members, and the court noted that "nobody has indicated there's a problem." The court further inquired whether the jury members could "look at the evidence, consider the evidence, the judge's instructions[,] and exchange information and continue with deliberations." The record does not reflect any specific additional ruling on Veatch's motion for mistrial on Tuesday.

The record reflects that the jury reconvened on Thursday and reached a verdict. There was no additional motion for mistrial made by Veatch.

On the record presented, we do not find an abuse of discretion by the district court in denying Veatch's motion for mistrial. On the Monday on which the motion was first made, the court specifically ruled that it was premature to conclude that the delay in resuming deliberations would warrant a mistrial. We do not find an abuse of discretion in that conclusion. At that point in time, there was no determination about how long the delay in resuming deliberations would be and there was nothing to indicate that the delay in resuming deliberations would have a damaging effect such that it would prevent a fair trial. See *State v. Mason*, 271 Neb. 16, 709 N.W.2d 638 (2006) (mistrial is properly granted in criminal case where event occurs during

course of trial which is of such nature that its damaging effect cannot be removed by proper admonition or instruction to jury and thus prevents fair trial).

Assuming that Veatch's submission of the motion in writing and submission of a brief in support of the motion on Tuesday could be construed as a renewal of the motion, we also do not find an abuse of discretion in the court's implied overruling of the motion again on that day. The court specifically inquired, on the record, whether the delay was having a negative effect on the jurors' memory and whether the jurors could still consider the evidence and instructions and continue deliberations. We cannot find an abuse of discretion in the court's implied conclusion that a mistrial was not warranted at that time, and Veatch did not renew the motion at any later time when the jury did reconvene and reach a verdict. This assignment of error is without merit.

7. Other Arguments

Any other arguments raised by Veatch in his brief either were not properly both assigned as error and argued in the brief or were not preserved for appellate review by Veatch's motion for new trial. As such, any other arguments raised by Veatch in his brief not specifically addressed in this opinion are not properly before us for resolution, and we will not further discuss them.

V. CONCLUSION

We find that only the issues properly preserved for appellate review in Veatch's motion for new trial are before us for resolution because Veatch did not file a timely direct appeal from the judgment. The issues that are properly before us are without merit. The court did not abuse its discretion in receiving the State's rule 404(2) evidence, in overruling Veatch's chain of custody objection to the letter containing the charged terroristic threat, in sustaining the State's objection to proffered alibi evidence, or in denying Veatch's motion for mistrial. Additionally, the evidence presented was sufficient to support the conviction. We affirm.

Affirmed.

3's Lounge Inc., a Nebraska corporation, appellant, v. Frank E. Tierney and Ok K. Tierney, husband and wife, appellees.

741 N.W.2d 687

Filed October 30, 2007. No. A-05-1164.

1. **Appeal and Error.** To be considered by an appellate court, an alleged error must be both specifically assigned and specifically argued in the brief of the party asserting the error.
2. **Actions: Pleadings.** The essential character of a cause of action and the remedy or relief it seeks as shown by the allegations of the complaint determine whether a particular action is one at law or in equity.
3. **Specific Performance: Equity.** An action for specific performance sounds in equity.
4. **Quiet Title: Equity.** A quiet title action sounds in equity.
5. **Declaratory Judgments.** An action for declaratory judgment is sui generis; whether such action is to be treated as one at law or one in equity is to be determined by the nature of the dispute.
6. **Equity: Appeal and Error.** On appeal from an equity action, an appellate court decides factual questions de novo on the record and, as to questions of both fact and law, is obligated to reach a conclusion independent of the trial court's determination.
7. **Evidence: Appeal and Error.** Where credible evidence is in conflict on material issues of fact, an appellate court considers and may give weight to the fact that the trial court observed the witnesses and accepted one version of the facts over another.
8. **Real Estate: Contracts: Options to Buy or Sell: Consideration: Time.** An option based upon a sufficient consideration for the purchase of real estate during a definite period cannot be withdrawn before the expiration of that time, but vests the legal holder thereof with a right to acquire an interest in the land. A subsequent purchaser who buys with knowledge that the occupant claims to have a contract for the purchase of the land is bound by the terms of that agreement, whether it is an option or an executory contract equally binding each party thereto.
9. **Property: Notice.** Possession of the land is notice to the world of the possessor's rights therein and of all possessory interests of which inquiry of the possessor would elicit knowledge.
10. **Property: Leases.** A transferee of an interest in leased property is obligated to perform an express promise contained in the lease if (1) the promise creates a burden that touches and concerns the transferred interest, (2) the promisor and promisee intend that the burden is to run with the transferred interest, (3) the transferee is not relieved of the obligation by the person entitled to enforce it, and (4) the transfer brings the transferee into privity of estate with the person entitled to enforce the promise.
11. ____: ____. A transferee of an interest in leased property comes into privity of estate with the person entitled to enforce a promise if, after the transfer, one holds directly under the other.

12. **Property: Landlord and Tenant.** A promise by the landlord touches and concerns his interest in the leased property to the extent its performance is not related to other property and affects the use and enjoyment of the leased property by the tenant.
13. **Property: Leases: Intent.** The burden of a promise will not run to a transferee if the original contracting parties manifest an intention that the promise not run with the land. Such intention may be found from the facts and circumstances surrounding the execution of the lease as well as from language in the lease itself.
14. **Property: Leases: Liability.** After a promisor transfers his or her interest in leased property, the promisor becomes secondarily liable to the person entitled to the benefit of the promise.
15. **Principal and Surety: Releases.** The release of a surety does not release the principal obligor of his or her duty.
16. **Waiver: Words and Phrases.** Waiver is a voluntary and intentional relinquishment or abandonment of a known existing legal right or such conduct as warrants an inference of the relinquishment of such right.
17. **Waiver: Estoppel.** In order to establish a waiver of a legal right, there must be clear, unequivocal, and decisive action of a party showing such purpose, or acts amounting to estoppel on his or her part.
18. **Specific Performance: Real Estate.** Real estate is assumed to possess the characteristic of uniqueness, and, therefore, special value, necessary for availability of specific performance.
19. **Specific Performance: Real Estate: Contracts.** Specific performance should generally be granted as a matter of course or right regarding a contract for the sale of real estate where a valid, binding contract exists which is definite and certain in its terms, mutual in its obligation, free from overreaching fraud and unfairness, and where the remedy at law is inadequate.
20. **Specific Performance: Proof.** A party seeking specific performance must show his or her right to the relief sought, including proof that the party is ready, able, and willing to perform his or her obligations under the contract.
21. **Equity.** Where a situation exists which is contrary to the principles of equity and which can be redressed within the scope of judicial action, a court of equity will devise a remedy to meet the situation.
22. **Judgments: Contracts: Specific Performance.** A decree for specific performance must as nearly as possible order the contract's performance according to its terms.

Appeal from the District Court for Douglas County: J RUSSELL DERR, Judge. Reversed and remanded with directions.

Thomas R. Ostdiek, of Fitzgerald, Schorr, Barmettler & Brennan, P.C., L.L.O., for appellant.

Martin A. Cannon, of Cannon Law Office, for appellees.

IRWIN, SIEVERS, and CASSEL, Judges.

CASSEL, Judge.

I. INTRODUCTION

3's Lounge Inc. held an option to purchase realty that it leased from HEB - AR, Inc. (HEB-AR). HEB-AR conveyed a portion of the leased property to Frank E. Tierney and Ok K. Tierney. 3's Lounge sued HEB-AR and the Tierneys to obtain title to the property conveyed to the Tierneys. Prior to trial, 3's Lounge settled its claims against HEB-AR and the district court for Douglas County dismissed HEB-AR from the lawsuit. After trial, the district court dismissed the claims against the Tierneys, finding that the dismissal of HEB-AR extinguished 3's Lounge's claims against the Tierneys. We conclude that as to the property conveyed to the Tierneys, the Tierneys were primarily liable to 3's Lounge, and that therefore, the release of HEB-AR, which was only secondarily liable, did not release the Tierneys. We reverse, and remand with directions.

II. BACKGROUND

On August 9, 1994, Club 10 Inc. leased a tract of real property (the leased property) from HEB-AR. Richard Walker and his brother signed the lease as corporate officers of Club 10 and individually as guarantors of Club 10's performance. The leased property is commonly referred to as "8919 North 30th Street, Omaha, Nebraska." While the legal description is complex, we need only state that it includes "Lot 6, Block 13," in "Florence, an Addition to the City of Omaha."

Club 10 initially agreed to lease the leased property for a 2-year term at a rate of $500 per month. The lease agreement (the lease) granted Club 10 the right to exercise nine separate and successive 2-year renewals.

The lease also gave Club 10 an irrevocable option to purchase the leased property. The lease specified that Club 10 could exercise its option at any time during its term, including during any extension or renewal. The lease established that if Club 10 exercised its option to purchase within 10 years of the execution of the lease, the purchase price would be $60,000, with credit given for all rental payments made by Club 10. The lease provided that all rental payments which became due after Club 10 provided notice of its intention to exercise the option would be suspended.

HEB-AR covenanted in the lease that it owned the leased property and that it "[would] not sell, alienate, assign, pledge, or otherwise transfer the [leased property] during any portion of the lease term, including but not limited to any renewals or extensions thereof." The lease also contained a provision stating that the lease and irrevocable option to purchase were personal to HEB-AR and Club 10 and "may not be assigned, transferred, sublet, or otherwise transferred without obtaining the prior written consent of each party [to the lease]."

The lease was recorded on September 9, 1994. In October 1995, Walker bought his brother's shares in Club 10 to become the sole owner of the corporation. On October 26, Club 10 changed its corporate name to 3's Lounge. The corporation effected the name change by adopting an amendment to its articles of incorporation. A file stamp shows that the Nebraska Secretary of State received, filed, and recorded the amendment on November 3.

On August 22, 1996, HEB-AR conveyed a portion of the leased property to the Tierneys, the record title owners of "Lot 7, Block 13." The north boundary of Lot 7 adjoins the south boundary of Lot 6. According to a survey plat, which recites dimensions shown on the original plat, Lots 6 and 7 are each 66 feet north and south and 132 feet east and west. Both lots border 30th Street on the west and an alley on the east. The south boundary of Lot 7 adjoins Fillmore Street. The property conveyed to the Tierneys consisted of the "Southerly one third (1/3) [22 feet] of Lot 6, Block 13" (the disputed property).

On the same day that HEB-AR conveyed the disputed property to the Tierneys, HEB-AR and the Tierneys granted one another reciprocal easements. HEB-AR granted the Tierneys an easement over a 10-foot strip of the portion of Lot 6 that had a common boundary with the disputed property, more particularly described as "[a] parcel [10] feet wide Starting [22 feet] North of the southerly property line of Lot 6." In return, the Tierneys granted HEB-AR a 10-foot wide easement along the northern boundary of the disputed property.

On October 20, 2000, Walker, acting on behalf of 3's Lounge, sent a letter to the Tierneys and to HEB-AR notifying them of 3's Lounge's intention to exercise its option to purchase the

leased property, including the disputed property. The Tierneys refused to recognize 3's Lounge's right to purchase the disputed property, giving rise to the instant lawsuit.

On August 29, 2001, 3's Lounge filed a petition seeking a declaratory judgment against HEB-AR and the Tierneys. In 3's Lounge's operative petition, filed at a later date, it alleged that the Tierneys had refused to recognize its right to purchase the disputed property and had asserted that their easement interest in a strip of land on Lot 6 was superior to 3's Lounge's interest in the same property. 3's Lounge alleged that the Tierneys took title to the disputed property subject to its right to purchase and that the Tierneys' easement interest was not superior to 3's Lounge's interest in the property.

3's Lounge set forth multiple causes of action. We describe only those causes of action that were not resolved by the court prior to trial. First, 3's Lounge requested that the court enter a declaratory judgment, declaring 3's Lounge's right to purchase the disputed property and determining the portion of the purchase price under the terms of the lease that would be properly allocable to the Tierneys in compensation for the disputed property. Next, 3's Lounge alleged that the Tierneys' refusal to convey the disputed property to 3's Lounge breached the terms of the lease. 3's Lounge requested that the court order specific performance of the terms of the option to purchase. Finally, 3's Lounge requested that the court quiet title to the disputed property in 3's Lounge if the court determined that declaratory judgment was not appropriate.

The Tierneys filed an answer denying the material allegations of the petition. The Tierneys asserted several affirmative defenses, including estoppel, accord and satisfaction, and consent. With regard to consent, the Tierneys alleged that 3's Lounge had consented to the conveyance of the disputed property and to the Tierneys' easement.

On April 27, 2004, in recited consideration of $10, HEB-AR conveyed to 3's Lounge all of the leased property except for the disputed property. 3's Lounge also accepted payment of an unspecified amount from HEB-AR as part of the arrangement. On May 5, 3's Lounge and HEB-AR filed a joint stipulation and moved the court for an order dismissing HEB-AR as a defendant

in the action because the parties had reached a settlement agreement. The court dismissed HEB-AR from the action. Neither the motion nor the order specified whether the dismissal was "with prejudice."

On May 5 and July 7, 2004, the court conducted a bench trial to resolve 3's Lounge's remaining claims against the Tierneys. After the trial, the district court dismissed 3's Lounge's petition. The court entered a lengthy decree, finding in favor of 3's Lounge on many issues before ultimately determining that by settling its claims against HEB-AR, 3's Lounge extinguished any claims it had against the Tierneys.

The court stated, "The only claim of [3's Lounge] to the disputed property is through the [l]ease with [HEB-AR]." The court acknowledged that under the ruling in *Harper v. Runner*, 85 Neb. 343, 123 N.W. 313 (1909), both HEB-AR and the Tierneys were bound by the option to purchase. However, according to the court, the relevant question was whether, once 3's Lounge resolved all of its claims against HEB-AR, it could continue its claims against the Tierneys. The court determined that the Tierneys were subject only to those claims that existed under the lease between 3's Lounge and HEB-AR. The court stated, "It seems axiomatic that when [3's Lounge] settled whatever claims it may have had against [HEB-AR] with regard to the option to purchase, [the Tierneys'] obligation, whatever it may be, was extinguished." Put another way, the court reasoned that the Tierneys had no greater obligation than that which existed between 3's Lounge and HEB-AR.

3's Lounge filed a motion for a new trial, alleging that the district court erred as a matter of law and fact in concluding that the dismissal of HEB-AR from the lawsuit terminated 3's Lounge's causes of action against the Tierneys. After a hearing, the district court overruled 3's Lounge's motion for a new trial.

3's Lounge timely appeals.

III. ASSIGNMENTS OF ERROR

3's Lounge assigns, consolidated and restated, that the district court erred in (1) treating its action as one at law rather than in equity; (2) holding that when it reached a settlement with HEB-AR and HEB-AR was dismissed from the lawsuit,

the lease was extinguished and the Tierneys were released from their obligation to convey the disputed property to 3's Lounge; (3) finding that its monetary settlement with HEB-AR was intended as monetary damages for HEB-AR's alleged breach of contract; (4) failing to find that the monetary settlement between 3's Lounge and HEB-AR was intended to prorate the option purchase price; (5) finding that the dismissal of HEB-AR was with prejudice; (6) allowing an officer of HEB-AR to testify regarding his proffered reason for entering into a settlement agreement with 3's Lounge; and (7) overruling its motion for a new trial.

IV. STANDARD OF REVIEW

3's Lounge alleges that the district court erred in treating its action against HEB-AR and the Tierneys as one at law. However, in its brief, 3's Lounge also states that its petition was pled in equity and "was treated as an action in equity by the [d]istrict [c]ourt." Brief for appellant at 17.

[1] To be considered by an appellate court, an alleged error must be both specifically assigned and specifically argued in the brief of the party asserting the error. *Olivotto v. DeMarco Bros. Co.*, 273 Neb. 672, 732 N.W.2d 354 (2007). In view of 3's Lounge's failure to argue the issue and its concession that the district court treated the action as one in equity, we do not consider 3's Lounge's first assigned error as such.

[2] We do, however, consider whether 3's Lounge's actions were at law or in equity in order to determine the correct standard of review. See *Precision Enters. v. Duffack Enters.*, 14 Neb. App. 512, 710 N.W.2d 348 (2006). The essential character of a cause of action and the remedy or relief it seeks as shown by the allegations of the complaint determine whether a particular action is one at law or in equity. *Dillon Tire, Inc. v. Fifer*, 256 Neb. 147, 589 N.W.2d 137 (1999). 3's Lounge requested a declaratory judgment and that the district court quiet title to the disputed property in 3's Lounge. It also set forth a breach of contract claim, but requested specific performance as a remedy.

[3-5] An action for specific performance sounds in equity. *Vande Guchte v. Kort*, 13 Neb. App. 875, 703 N.W.2d 611 (2005). A quiet title action sounds in equity. *Huffman v. Peterson*, 272 Neb. 62, 718 N.W.2d 522 (2006). An action for declaratory

judgment is sui generis; whether such action is to be treated as one at law or one in equity is to be determined by the nature of the dispute. *R & S Investments v. Auto Auctions*, 15 Neb. App. 267, 725 N.W.2d 871 (2006).

[6,7] We determine that the nature of the dispute sounds in equity. 3's Lounge's goal in the suit is title to the disputed property, not monetary damages. On appeal from an equity action, we decide factual questions de novo on the record and, as to questions of both fact and law, are obligated to reach a conclusion independent of the trial court's determination. *County of Sarpy v. City of Gretna*, 273 Neb. 92, 727 N.W.2d 690 (2007). Where credible evidence is in conflict on material issues of fact, the court considers and may give weight to the fact that the trial court observed the witnesses and accepted one version of the facts over another. *Precision Enters. v. Duffack Enters., supra*.

V. ANALYSIS

1. Settlement With HEB-AR

The district court concluded that when 3's Lounge settled its claims against HEB-AR, it also extinguished its claims to enforce the option to purchase against the Tierneys. 3's Lounge asserts that this finding by the district court was erroneous. We agree.

HEB-AR and 3's Lounge entered into a lease agreement with an irrevocable option to purchase. Because they reached an express agreement binding both parties, they were in privity of contract with one another. See *Gatchell v. Henderson*, 156 Neb. 1, 54 N.W.2d 227 (1952). Because they were connected through privity of contract, after the disputed property was transferred to the Tierneys HEB-AR remained bound by 3's Lounge's option to purchase the disputed property until 3's Lounge relieved HEB-AR of this obligation. See Restatement (Second) of Property § 16.1(1)(a) (1977).

In contrast, the Tierneys were not in privity of contract with 3's Lounge. These parties had no contractual relationship. However, as we discuss below, the Tierneys came into privity of estate with 3's Lounge upon their receipt of title to the disputed property and acquired their title to the disputed property subject to 3's Lounge's option to purchase.

(a) Nebraska Precedent

[8] In *Harper v. Runner*, 85 Neb. 343, 346, 123 N.W. 313, 314 (1909), a case that is factually similar to the instant case, the Nebraska Supreme Court held:

> An option based upon a sufficient consideration for the purchase of real estate during a definite period cannot be withdrawn before the expiration of that time, but vests the legal holder thereof with a right to acquire an interest in the land. . . . A subsequent purchaser who buys with knowledge that the occupant claims to have a contract for the purchase of the land is bound by the terms of that agreement, whether it is an option or an executory contract equally binding each party thereto.

(Citations omitted.)

It follows that if the Tierneys had knowledge of 3's Lounge's option to purchase when they took possession of the disputed property, they became bound by the option. The testimony at trial demonstrated that the Tierneys had the requisite knowledge.

Frank was asked whether he knew, prior to receiving title to the disputed property, that 3's Lounge was leasing Lot 6. He responded, "Well, you know, I actually — you want to know the truth? I thought [HEB-AR] was leasing it to [Club 10] because I ran a title search." He testified that he believed that Walker's brother was the tenant in possession of the option to purchase and that Club 10's interest in the property was extinguished. However, he admitted that the sign on the property read "3's [Lounge]" and not "Club 10." He also admitted that he knew that Walker (not his brother) was the contact for 3's Lounge and that an officer of HEB-AR had informed him that Walker was the tenant of Lot 6.

[9] Possession of the land is notice to the world of the possessor's rights therein and of all possessory interests of which inquiry of the possessor would elicit knowledge. *Grand Island Hotel Corp. v. Second Island Development Co.*, 191 Neb. 98, 214 N.W.2d 253 (1974). Had Frank inquired into the status of 3's Lounge's interest, he would have easily discovered that 3's Lounge held an option to purchase the disputed property. Further, the name change from Club 10 to 3's Lounge was properly recorded in the office of the Secretary of State.

The district court found that Frank most likely knew that 3's Lounge had an option to purchase the disputed property. The court determined that there was "little or no evidence that [Frank] did not have actual or at least constructive knowledge that [3's Lounge] had some interest in the [disputed property]." We give weight to this finding and conclude that the Tierneys had knowledge of 3's Lounge's option to purchase and, therefore, pursuant to the holding in *Harper v. Runner, supra*, were bound by the option.

(b) Restatement

[10] The Restatement's approach to this issue is consistent with the holding in *Harper v. Runner*. The Restatement (Second) of Property § 16.1 at 116 (1977) states:

> (2) A transferee of an interest in leased property is obligated to perform an express promise contained in the lease if:
>
> (a) the promise creates a burden that touches and concerns the transferred interest;
>
> (b) the promisor and promisee intend that the burden is to run with the transferred interest;
>
> (c) the transferee is not relieved of the obligation by the person entitled to enforce it; and
>
> (d) the transfer brings the transferee into privity of estate with the person entitled to enforce the promise.

[11] A transferee of an interest in leased property comes into privity of estate with the person entitled to enforce a promise if, after the transfer, "one holds directly under the other." *Id.*, comment *e*. at 123. If the transferor is the landlord, the transferee comes into privity of estate with the other party to the lease if the interest in the reversion that the transferee receives would place him first in line to succeed the other party to the lease in the possession of the leased property if the other party's interest terminated immediately. *Id.* After HEB-AR conveyed the disputed property to the Tierneys, the Tierneys became first in line to succeed 3's Lounge in possession of the disputed property and therefore came into privity of estate with 3's Lounge.

[12] The other requirements of § 16.1(2) were also fulfilled. HEB-AR's promise to honor 3's Lounge's option to purchase

created a burden that touched and concerned the disputed property. A promise by the landlord touches and concerns his interest in the leased property to the extent its performance is not related to other property and affects the use and enjoyment of the leased property by the tenant. *Id.*, § 16.1, comment *b*. HEB-AR's promise clearly did not relate to any other property and affected 3's Lounge's use and enjoyment of the disputed property.

[13] HEB-AR and 3's Lounge intended that the burden run with the transferred interest. The burden of a promise will not run to a transferee if the original contracting parties manifest an intention that the promise *not* run with the land. See *id.*, comment *e*. Such intention may be found "from the facts and circumstances surrounding the execution of the lease as well as from language in the lease itself." *Id.* at 122. The lease included a provision stating that the lease and option to purchase were personal to 3's Lounge and HEB-AR. While the right to exercise the option was personal to 3's Lounge, the burden associated with that right clearly ran with the land. The lease granted 3's Lounge the absolute right to purchase the leased property if it exercised its option in accordance with the terms of the lease. The lease stated that the option was "irrevocable and cannot be changed or altered or revoked by [HEB-AR]." We conclude that the option was not revoked by the transfer of the property to the Tierneys and that the burden of the option ran with the property.

Finally, 3's Lounge never relieved the Tierneys of the obligation created by the option to purchase. The district court held that when 3's Lounge settled its claims against HEB-AR, the Tierneys' obligations under the lease and option to purchase were extinguished. The Restatement does not support the district court's holding. While 3's Lounge released its claims against HEB-AR, it did not release the Tierneys—a critical distinction under the Restatement.

(c) Release of Surety Does Not Release Primary Obligor

[14] The Restatement recognizes that after a promisor transfers his or her interest in leased property, the promisor becomes secondarily liable to the person entitled to the benefit of the promise. See Restatement (Second) of Property § 16.1, comment *e*. (1977). The promisor becomes, in effect, a surety. See

id. In the instant case, after HEB-AR transferred the disputed property to the Tierneys, the Tierneys became primarily liable to 3's Lounge upon the obligation to convey the disputed property and HEB-AR became, in effect, a surety.

[15] While the release of a principal without the surety's consent releases the surety, the converse is not true. The release of a surety does not release the principal obligor of his or her duty.

> "Not only may a creditor, if he [or she] so chooses, release or compound with a surety, but he [or she] may do so without in any way affecting his [or her] right to hold the principal to his [or her] ultimate liability. In other words, not only will such a release have no effect in discharging the principal, but the latter will not be entitled to credit on his [or her] obligation for any sum paid by the surety in consideration of his [or her] release as such surety."

Coleman v. Beck, 142 Neb. 13, 21, 5 N.W.2d 104, 108 (1942).

In *Price v. S. S. Fuller, Inc.*, 639 P.2d 1003 (Alaska 1982), the Alaska Supreme Court applied a similar rule in a situation where the liability was established by privity of estate. In that case, the lessee of a tract of land assigned the lease to another party, the transferee. The lessor of the property commenced actions against both the original lessee and the transferee to recover the leased property and for unpaid rent. Before a judgment was rendered, the lessor dismissed all claims against the original lessee. Judgment was thereafter entered against the transferee. The transferee appealed, alleging, first, that because the original lessee remained liable based upon privity of contract for the transferee's defaults, the release of the lessee acted as a release of the transferee, and, second, that the rule that the release of one joint obligor under a contract releases the other joint obligor should have been applied to the case.

The Alaska Supreme Court first held that the lessee and transferee were not joint obligors. Rather, the court held that the original lessee was, in effect, a surety and was secondarily liable to the lessor as between the lessee and the transferee. The court held that this secondary relationship arose from the lessee's continuing liability to the lessor under privity of contract while the transferee was liable through privity of estate. While the court noted that the release of the principal would normally release

the surety, it recognized that "a release of the surety has no effect upon the principal's obligation except as a satisfaction." *Id*. at 1009.

While the instant case differs from *Price* in that the transferor in the instant case, HEB-AR, was the landlord, not the tenant as in *Price*, the same principles apply to the case before us. The release of HEB-AR had no effect upon the Tierneys' obligation to 3's Lounge. The Tierneys remained obligated to 3's Lounge and had an obligation to convey the disputed property to 3's Lounge upon exercise of the option. The district court's holding to the contrary is erroneous and is reversed.

(d) Tierneys' Arguments

We reject the Tierneys' contrary arguments. The Tierneys assert the same argument that was made by the transferee in *Price*—that they should have been discharged from liability when HEB-AR was discharged, because they were joint obligors with HEB-AR. Of course, the voluntary release of one joint judgment debtor, or joint obligor, operates as a release of his or her co-obligor. See *Coleman v. Beck, supra*. However, this rule has no application to the case before us. HEB-AR was not a joint obligor with the Tierneys. We find no evidence that HEB-AR and the Tierneys intended to create a joint obligation. Instead, after HEB-AR's conveyance to the Tierneys, HEB-AR remained secondarily liable to 3's Lounge. This argument is without merit.

[16,17] The Tierneys also allege that 3's Lounge waived its right to exercise its option to purchase the disputed property. Waiver is a voluntary and intentional relinquishment or abandonment of a known existing legal right or such conduct as warrants an inference of the relinquishment of such right. *MBH, Inc. v. John Otte Oil & Propane*, 15 Neb. App. 341, 727 N.W.2d 238 (2007). In order to establish a waiver of a legal right, there must be clear, unequivocal, and decisive action of a party showing such purpose, or acts amounting to estoppel on his or her part. *Id*.

3's Lounge had a vested right to purchase the disputed property. See *Winberg v. Cimfel*, 248 Neb. 71, 532 N.W.2d 35 (1995). There is no evidence in the record that 3's Lounge

waived such right. Walker testified that at no point did he waive 3's Lounge's right to exercise its option to purchase the disputed property. Although he waited several years after the transfer of the disputed property to the Tierneys to exercise 3's Lounge's option, that alone does not show a clear, unequivocal, and decisive action to waive the option. The district court was persuaded by Walker's testimony that he did not act immediately after HEB-AR transferred the disputed property to the Tierneys because he did not believe that the transfer "was worth the paper it was written on." We give weight to the district court's reliance on this testimony and find that this argument has no merit.

2. Appropriate Relief

[18,19] Because the district court determined that 3's Lounge's claims were extinguished, it did not consider the appropriate relief. Real estate is assumed to possess the characteristic of uniqueness, and, therefore, special value, necessary for availability of specific performance. *Frenzen v. Taylor*, 232 Neb. 41, 439 N.W.2d 473 (1989). Specific performance should generally be granted as a matter of course or right regarding a contract for the sale of real estate where a valid, binding contract exists which is definite and certain in its terms, mutual in its obligation, free from overreaching fraud and unfairness, and where the remedy at law is inadequate. See *id*. 3's Lounge is entitled to specific performance of the rights conferred by its option to purchase the disputed property, including the right to a conveyance of the disputed property from the Tierneys.

[20] A party seeking specific performance must show his or her right to the relief sought, including proof that the party is ready, able, and willing to perform his or her obligations under the contract. *Langemeier v. Urwiler Oil & Fertilizer*, 265 Neb. 827, 660 N.W.2d 487 (2003). Of course, 3's Lounge is required to perform its obligations under the option—the principal obligation being the payment of the purchase price.

[21] 3's Lounge sought a determination by the district court of the share of the purchase price owed to the Tierneys. HEB-AR and the Tierneys failed to allocate the purchase price between themselves. Where a situation exists which is contrary to the principles of equity and which can be redressed within the

scope of judicial action, a court of equity will devise a remedy to meet the situation. *Trieweiler v. Sears*, 268 Neb. 952, 689 N.W.2d 807 (2004). It therefore falls to the court to equitably apportion the purchase price.

[22] A decree for specific performance must as nearly as possible order the contract's performance according to its terms. *Fritsch v. Hilton Land & Cattle Co.*, 245 Neb. 469, 513 N.W.2d 534 (1994). The contract in the instant case provided for an option price of $60,000. 3's Lounge was to receive credit against the price for its rental payments of $500 per month for 10 years—thus, the credit would precisely equal the purchase price. As a result of the settlement with HEB-AR, HEB-AR refunded or forgave the seven installments of rent due from January 1 to August 1, 2004—a total of $3,500. While one might calculate a variety of allocations based upon the evidence before us, requiring 3's Lounge to pay the Tierneys the sum of $3,500 as a condition of the decree of specific performance achieves the goal of attaining performance of the contract's terms as closely as possible by requiring 3's Lounge to pay the full contract price—no more and no less. Of course, the costs of the action and compliance with the decree shall be taxed to the Tierneys. Upon remand, the district court shall fashion a decree of specific performance in conformity with this opinion.

3. Remaining Assignments of Error

In view of our disposition of 3's Lounge's principal contention on appeal, we need not consider its other assignments of error. See *Kelly v. Kelly*, 246 Neb. 55, 516 N.W.2d 612 (1994) (appellate court not obligated to engage in analysis not needed to adjudicate case and controversy before it).

VI. CONCLUSION

We conclude that 3's Lounge's claims against the Tierneys were not extinguished when 3's Lounge reached a settlement agreement with HEB-AR. As a result of the conveyance of the disputed property from HEB-AR to the Tierneys, the Tierneys were in privity of estate with 3's Lounge and primarily liable to perform the obligations of the option contract entitling 3's Lounge to purchase the disputed property. 3's Lounge

is entitled to a decree of specific performance requiring the Tierneys to convey the disputed property, subject to 3's Lounge's obligation to perform its contractual obligations, including payment of the balance of the purchase price. We reverse the judgment of the district court and remand the cause to that court with instructions to fashion a decree of specific performance in conformity with this opinion.

REVERSED AND REMANDED WITH DIRECTIONS.

JAMES McKAY, APPELLANT, V. HERSHEY FOOD CORP., APPELLEE.

740 N.W.2d 378

Filed October 30, 2007. No. A-06-1193.

1. **Workers' Compensation: Appeal and Error.** Under Neb. Rev. Stat. § 48-185 (Reissue 2004), an appellate court may modify, reverse, or set aside a Workers' Compensation Court decision only when (1) the compensation court acted without or in excess of its powers; (2) the judgment, order, or award was procured by fraud; (3) there is not sufficient competent evidence in the record to warrant the making of the order, judgment, or award; or (4) the findings of fact by the compensation court do not support the order or award.
2. **Workers' Compensation: Statutes: Appeal and Error.** The meaning of a statute is a question of law, and an appellate court is obligated in workers' compensation cases to make its own determinations as to questions of law.
3. **Statutes: Appeal and Error.** Appellate courts give statutory language its plain and ordinary meaning and will not resort to interpretation to ascertain the meaning of statutory words which are plain, direct, and unambiguous.
4. **Final Orders.** As a general matter, where an order is clearly intended to serve as a final adjudication of the rights and liabilities of the parties, the silence of the order on requests for relief not spoken to can be construed as a denial of those requests under the circumstances.
5. **Workers' Compensation: Proof.** To obtain a modification of a workers' compensation award, an applicant must prove, by a preponderance of evidence, that the increase or decrease in incapacity was due solely to the injury resulting from the original accident.
6. ____: ____. An applicant seeking modification of a workers' compensation award must prove there exists a material and substantial change for the better or worse in the condition—a change in circumstances that justifies a modification, distinct and different from the condition for which the adjudication had previously been made.
7. **Summary Judgment.** Summary judgment is proper when the pleadings and evidence admitted at the hearing disclose that there is no genuine issue as to any material fact or as to the ultimate inferences that may be drawn from those facts and that the moving party is entitled to judgment as a matter of law.

8. **Summary Judgment: Appeal and Error.** In reviewing a summary judgment, an appellate court views the evidence in the light most favorable to the party against whom the judgment is granted and gives such party the benefit of all reasonable inferences deducible from the evidence.

Appeal from the Workers' Compensation Court. Affirmed.

Todd Bennett, of Rehm, Bennett & Moore, for appellant.

Patrick R. Guinan, of Erickson & Sederstrom, P.C., for appellee.

INBODY, Chief Judge, and IRWIN and MOORE, Judges.

MOORE, Judge.

INTRODUCTION

James McKay sought modification of a prior award of the Nebraska Workers' Compensation Court in order to obtain vocational rehabilitation services. The trial court found that under Neb. Rev. Stat. § 48-141 (Reissue 2004), McKay was required to prove an increase in incapacity due solely to his work-related injury, and the court granted summary judgment in favor of Hershey Food Corp. (Hershey), McKay's former employer. McKay appealed to the three-judge review panel of the compensation court, arguing that he did not need to prove an increase in incapacity and that the requested modification was authorized under Neb. Rev. Stat. § 48-162.01(7) (Cum. Supp. 2006). The review panel affirmed the decision of the trial court, and McKay has appealed to this court. Because we agree with the trial court and review panel's determination that § 48-162.01(7) is inapplicable and that McKay was required to prove an increase in incapacity, which he did not do, we affirm.

BACKGROUND

McKay was employed by Hershey on December 26, 1997, when he was injured in a work-related accident. Hershey paid McKay certain indemnity benefits, but on November 26, 2001, McKay filed a petition in the compensation court seeking additional benefits. McKay sought temporary and permanent disability benefits; payment of medical expenses; vocational rehabilitation benefits; and waiting-time penalties, attorney fees, and interest.

In its amended answer, filed June 26, 2002, Hershey admitted that McKay was an employee and that he suffered a work-related injury. Hershey denied the nature and extent of McKay's injuries. Hershey denied the remaining allegations of McKay's petition, including his entitlement to vocational rehabilitation benefits.

On October 4, 2002, the trial court entered an award in McKay's favor. The trial judge accepted the parties' stipulation that McKay was employed by Hershey on December 26, 1997, earning an average weekly wage of $793.50, and suffered injury on that date in an accident arising out of and in the course of his employment. The trial judge also accepted the parties' stipulations as to temporary total and temporary partial disability and found that McKay was correctly paid the compensation to which he was entitled for those periods. The trial judge found that McKay suffered a 30-percent permanent loss of earning capacity and was entitled to compensation at the rate of $158.70 per week for 246⅘ weeks, crediting Hershey for payments made. In discussing McKay's loss of earning capacity, the trial judge observed, as "[s]omething else for the Court to consider," the fact that Hershey announced at one time that it would close its Omaha plant sometime around March 31, 2002. The trial judge further observed that the closing did not occur but that it "underscore[d] the fragility of [McKay's] present employment." The trial judge did not further address any claim for, or make an award of, vocational rehabilitation services. Finally, the trial judge ordered the payment of certain medical bills.

The record before us shows that Hershey's Omaha plant closed in 2004 and that all hourly employees, including McKay, were offered a program that allowed for up to 2 years of additional education and retraining. After the plant's closing, McKay found other employment, earning $10.50 per hour.

After the closing of the Hershey plant, McKay filed a request with the compensation court for the appointment of a vocational rehabilitation counselor, which request was granted by the trial court. On November 4, 2004, Hershey filed a motion to strike the appointment of the vocational rehabilitation counselor, because McKay failed to give notice to Hershey of his request for the appointment. The trial court entered an order on December 29,

granting Hershey's motion to strike. In the December 29 order, the trial judge first found that the motion to strike should be granted because there was no evidence that any notice was given to Hershey or its insurer of any request for appointment of a vocational counselor. The trial court also observed that in the original award, it had not awarded McKay any vocational training, and that McKay was seeking to modify the original award to obtain such retraining. The trial judge found that in order for McKay to obtain vocational rehabilitation services, he was required to "make a prima facie showing that there ha[d] been an increase in his incapacity due solely to the injury."

On January 11, 2005, McKay filed an application for review of the December 29, 2004, order. McKay requested that the three-judge review panel reverse the December 29 order and find that he was not required to show an increase in incapacity under § 48-141, but, rather, was entitled to apply for vocational rehabilitation benefits under § 48-162.01(7).

The review panel entered an order of affirmance on review on September 30, 2005, affirming the trial court's order striking the appointment of the vocational rehabilitation counselor. The review panel found that the record clearly established that McKay did not provide notice to Hershey prior to requesting the appointment of a rehabilitation counselor and that the lack of such notice was a sufficient basis for the trial court to sustain Hershey's motion to strike. The review panel also held as follows:

> Aside from the procedural infirmity attending [McKay's] request for the appointment of a vocational rehabilitation counselor, a substantive shortcoming also exists. As properly noted by [the trial judge], no award of vocational rehabilitation benefits was accorded [McKay] in the original Award entered on October 4, 2002. Absent such an award of vocational rehabilitation benefits, the panel believes that any future request regarding same must comply with the dictates of Bennett v. J.C. Robinson Seed Co., 7 Neb. Ct. App. 525, 583 N.W.2d 370 (1998). In other words, [McKay] needed to allege and ultimately make a requisite showing that he had suffered an increase in incapacity due

solely to the original injury. A review of the record fails to evidence any such allegation.

McKay did not appeal the review panel's order of September 30, 2005. Rather, on August 18, before the review panel entered its order of affirmance on review, McKay filed a petition to modify the October 4, 2002, award. In his petition to modify, McKay alleged that he had sustained a material and substantial increase in his incapacity due solely to his work-related injury and requested that the trial court award him additional benefits, including vocational rehabilitation. McKay also alleged that "in the interest of justice the compensation court or judge thereof may also modify a previous finding, order, award, or judgment relating to physical, medical, or vocational rehabilitation services as necessary in order to accomplish the goal of restoring the injured employee to gainful and suitable employment" pursuant to § 48-162.01(7).

After filing an answer denying that McKay had sustained an increase in his incapacity or that he was entitled to additional benefits, Hershey served interrogatories, asking McKay to describe the change in his condition, and a request for production of documents, asking McKay to identify all documents that supported his claim that he had sustained a material and substantial increase in his incapacity due solely to his work-related injury. McKay responded to the request for production by providing Hershey with medical records that predated the October 4, 2002, award. Subsequently, Hershey moved for summary judgment, alleging that there was no genuine issue of material fact and that Hershey was entitled to judgment as a matter of law.

The trial court heard Hershey's motion for summary judgment on January 11, 2006, and entered an order on January 23, granting Hershey's motion. The trial judge found that § 48-162.01(7) was not applicable, because the original award made no finding, order, award, or judgment relating to physical, medical, or vocational rehabilitation services. The trial judge found that McKay was obliged to comply with the provisions of § 48-141 and that McKay was unable to do so when all of his medical evidence predated the court's original award of benefits.

McKay appealed to the review panel, alleging, among other things, that the trial court erred in its determination that

§ 48-162.01(7) was not applicable and that McKay was required to prove a material and substantial change in his physical condition. McKay did not assign as error the trial court's determination that the medical records he presented at the summary judgment hearing, which records predated the original award, were not sufficient to establish an increase in his incapacity after the original award was entered.

The review panel entered an order of affirmance on review on October 3, 2006. In the majority opinion, two judges of the review panel stated in part as follows:

> The review panel has carefully examined subsection 7 [of § 48-162.01] and concludes that the trial judge correctly interpreted the provisions set forth therein. In other words, to invoke subsection 7, a prior award of vocational rehabilitation services must have been made. It is the understanding of the review panel that the provision relied upon by [McKay] was passed by the legislature in response to decisions from the Nebraska Supreme Court indicating that the compensation court lacked the power to modify a preexisting [vocational rehabilitation] plan after its order became final. Dougherty v. Swift-Eckrich, Inc., 251 Neb. 333, 557 N.W.2d 31 (1996). Thus, when viewed within the proper framework, it is clear that the trial judge's interpretation and conclusions are correct. The review panel finds [McKay's] assertion to the contrary to be without merit.

In a separate concurrence, the third judge of the review panel noted:

> The 1997 amendment to § 48-162.01 is limited to a modification of a previous award relating to physical, medical, or vocational rehabilitation services. In this case, there is no previous award addressing vocational rehabilitation services. As a result, there is no award to modify under § 48-162.01(7).
>
> The original award did not address vocational rehabilitation services. Under Dawes v. Wittstruck Sandblasting & Painting, Inc., 266 Neb. 526, 667 N.W.2d 167 (2003) the failure of the trial court to address vocational rehabilitation services in its award in **this case** is the equivalent of a denial of vocational rehabilitation services. In order to

> obtain vocational rehabilitation services, [McKay] must meet the requirements of § 48-141, the modification statute, which [McKay] failed to do.

(Emphasis in original.)

ASSIGNMENT OF ERROR

McKay asserts, consolidated and restated, that the trial court erred in failing to find that he was entitled to vocational rehabilitation services.

STANDARD OF REVIEW

[1-3] Under Neb. Rev. Stat. § 48-185 (Reissue 2004), an appellate court may modify, reverse, or set aside a Workers' Compensation Court decision only when (1) the compensation court acted without or in excess of its powers; (2) the judgment, order, or award was procured by fraud; (3) there is not sufficient competent evidence in the record to warrant the making of the order, judgment, or award; or (4) the findings of fact by the compensation court do not support the order or award. *Knapp v. Village of Beaver City*, 273 Neb. 156, 728 N.W.2d 96 (2007). The meaning of a statute is a question of law, and an appellate court is obligated in workers' compensation cases to make its own determinations as to questions of law. *Id.* Appellate courts give statutory language its plain and ordinary meaning and will not resort to interpretation to ascertain the meaning of statutory words which are plain, direct, and unambiguous. *Id.*

ANALYSIS

[4] We first observe that as a general matter, where an order is clearly intended to serve as a final adjudication of the rights and liabilities of the parties, the silence of the order on requests for relief not spoken to can be construed as a denial of those requests under the circumstances. *D'Quaix v. Chadron State College*, 272 Neb. 859, 725 N.W.2d 558 (2007). The original award of benefits to McKay, entered on October 4, 2002, does not discuss vocational rehabilitation. The October 2002 order was clearly intended to serve as a final order, and thus, the trial judge's silence on the issue of vocational rehabilitation services can be construed as a denial of those services. The question then becomes, under those circumstances, whether it was necessary in

the present modification action for McKay to prove an increase in incapacity under § 48-141 in order to obtain vocational rehabilitation services or whether the original award could be modified to grant vocational rehabilitation services under § 48-162.01(7) without having to prove an increase in incapacity.

Section 48-141 provides:

> All amounts paid by an employer or by an insurance company carrying such risk, as the case may be, and received by the employee or his or her dependents by lump-sum payments, approved by order pursuant to section 48-139, shall be final, but the amount of any agreement or award payable periodically may be modified as follows: (1) At any time by agreement of the parties with the approval of the Nebraska Workers' Compensation Court; or (2) if the parties cannot agree, then at any time after six months from the date of the agreement or award, an application may be made by either party on the ground of increase or decrease of incapacity due solely to the injury or that the condition of a dependent has changed as to age or marriage or by reason of the death of the dependent. In such case, the same procedure shall be followed as in sections 48-173 to 48-185 in case of disputed claim for compensation.

Section 48-162.01(7) provides:

> If the injured employee without reasonable cause refuses to undertake or fails to cooperate with a physical, medical, or vocational rehabilitation program determined by the compensation court or judge thereof to be suitable for him or her or refuses to be evaluated under subsection (3) or (6) of this section or fails to cooperate in such evaluation, the compensation court or judge thereof may suspend, reduce, or limit the compensation otherwise payable under the Nebraska Workers' Compensation Act. *The compensation court or judge thereof may also modify a previous* finding, order, *award*, or judgment *relating to* physical, medical, or *vocational rehabilitation services as necessary in order to accomplish the goal of restoring the injured employee to gainful and suitable employment, or as otherwise required in the interest of justice*.

(Emphasis supplied.)

McKay relies on the last sentence of § 48-162.01(7) and argues that the application of § 48-162.01(7) is necessary "in the interest of justice" under the circumstances of this case. The circumstances referred to by McKay are the closure of the Hershey plant, the physical restrictions that have been imposed on McKay due to his work-related injury, and the fact that at his current job, he earns significantly less than he did while employed by Hershey. McKay refers us to the earning capacity discussion in the original award, arguing that if the trial judge had chosen at the time of the original award to "act on the 'fragility of [McKay's] present employment,'" vocational rehabilitation clearly would have been necessary "to return [McKay] to his former level of income and employment with another employer." Brief for appellant at 11. In other words, McKay argues that if continued employment with Hershey had not been available at the time, he would have suffered significant loss of access to the employment market and would have needed vocational rehabilitation in order to return to suitable employment. While that may certainly have been the case, McKay's arguments do nothing to change the fact that no vocational services were awarded to him at the time of the original award.

We agree with the conclusion of the trial court and review panel that the lack of an award of vocational rehabilitation services in the original award prevents the application of § 48-162.01(7) in this case. The last sentence of § 48-162.01(7), upon which McKay relies, was added by the Legislature when it adopted 1997 Neb. Laws, L.B. 128, § 4. The review panel concluded that the power of modification given to the compensation court by the 1997 amendment to § 48-162.01 was limited to modifications of a previous award relating to physical, medical, or vocational services. We agree with this conclusion because it is consistent with the legislative history of L.B. 128. The Introducer's Statement of Intent for L.B. 128 provides in relevant part that the bill

> would allow the modification of a vocational rehabilitation plan by the Court after the award has become final for the purpose of restoring the employee to gainful and suitable employment or as otherwise required in the interest of justice. This change is sought as a result of a Supreme Court

> decision which stated these plans could not be modified after becoming final.

Business and Labor Committee, 95th Leg., 1st Sess. (Jan. 27, 1997). A review of the legislative history shows that the bill was introduced in response to the Nebraska Supreme Court's decision in *Dougherty v. Swift-Eckrich*, 251 Neb. 333, 557 N.W.2d 31 (1996). In *Dougherty*, the court awarded the plaintiff vocational rehabilitation benefits under a plan for certain retraining that was to end on a particular date. However, the plaintiff was unable to complete his training by the date specified in the plan. Subsequently, the plaintiff sought from the compensation court an extension of the completion date specified in the original award. The trial judge found that the delay in completing the retraining program was through no fault of the plaintiff's but was due to his need for certain remedial work and that the original plan was based on the rehabilitation counselor's miscalculation of the time which would be required to complete the course. The trial judge granted the extension, and the employer appealed. On appeal, the Supreme Court concluded that, essentially, the compensation court had attempted to correct an error in the original award, which award had become final. The Supreme Court concluded that there was no statute empowering the compensation court to make such a modification and that the court had acted in excess of its powers. Again, a review of the legislative history of L.B. 128, § 4, makes it clear that the bill was in response to the *Dougherty* decision and was to provide a mechanism for the compensation court to modify vocational rehabilitation plans due to changes in circumstances after the entry of an initial plan of vocational rehabilitation.

We conclude that the plain language of the last sentence of § 48-162.01(7) contemplates a modification of services previously granted and does not provide for a modification of a final order to grant entirely new services or benefits. As noted above, this conclusion is supported by the legislative history for L.B. 128, § 4. Because there was no previous award relating to vocational rehabilitation services in this case, there was nothing for the court to modify. Accordingly, the trial court correctly determined that § 48-162.01(7) was not applicable, and the review panel did not err in affirming that determination.

[5,6] We agree with the trial court's conclusion that in order to obtain the requested vocational rehabilitation services, McKay needed to comply with the requirements of § 48-141 and allege and prove that he had suffered an increase in incapacity since the entry of the original award. Nebraska case law provides that in order to obtain a modification, an applicant must prove, by a preponderance of evidence, that the increase or decrease in incapacity was due solely to the injury resulting from the original accident. *Hagelstein v. Swift-Eckrich*, 261 Neb. 305, 622 N.W.2d 663 (2001). The applicant must prove there exists a material and substantial change for the better or worse in the condition—a change in circumstances that justifies a modification, distinct and different from the condition for which the adjudication had previously been made. *Id.*

In his petition for modification, McKay did in fact allege that he had sustained a material and "substantiating" change in his condition due solely to his work injury and sustained "an increase in his physical condition." The trial court found, however, that McKay did not prove an increase in incapacity, because the medical evidence submitted at the hearing on McKay's petition to modify all predated the original award, a finding which McKay has not challenged on appeal. We agree with the trial court's conclusion that medical records predating the original award are insufficient to prove a material and substantial change in McKay's condition since the original award.

[7,8] The trial court granted Hershey's motion for summary judgment. Summary judgment is proper when the pleadings and evidence admitted at the hearing disclose that there is no genuine issue as to any material fact or as to the ultimate inferences that may be drawn from those facts and that the moving party is entitled to judgment as a matter of law. *Johnson v. Knox Cty. Partnership*, 273 Neb. 123, 728 N.W.2d 101 (2007). In reviewing a summary judgment, an appellate court views the evidence in the light most favorable to the party against whom the judgment is granted and gives such party the benefit of all reasonable inferences deducible from the evidence. *Id.* Viewing the evidence in the light most favorable to McKay, we conclude that the trial court properly granted summary judgment and that the review panel did not err in affirming the trial court's decision.

CONCLUSION

Because the original award of benefits did not include an award of vocational rehabilitation services, § 48-162.01(7) is inapplicable to modify the original award. Because McKay failed to prove that he suffered an increase in incapacity since the entry of the original award as required for modification under § 48-141, the trial court properly granted Hershey's motion for summary judgment, and the review panel did not err in affirming this decision.

AFFIRMED.

BRANDY S. MORALES, APPELLEE, V. SWIFT BEEF COMPANY, APPELLANT.

741 N.W.2d 433

Filed October 30, 2007. No. A-06-1440.

1. **Workers' Compensation: Appeal and Error.** Pursuant to Neb. Rev. Stat. § 48-185 (Reissue 2004), an appellate court may modify, reverse, or set aside a Workers' Compensation Court decision only when (1) the compensation court acted without or in excess of its powers; (2) the judgment, order, or award was procured by fraud; (3) there is not sufficient competent evidence in the record to warrant the making of the order, judgment, or award; or (4) the findings of fact by the compensation court do not support the order or award.
2. ____: ____. In determining whether to affirm, modify, reverse, or set aside a judgment of the Workers' Compensation Court review panel, a higher appellate court reviews the findings of the trial judge who conducted the original hearing.
3. **Jurisdiction: Appeal and Error.** Before reaching the legal issues presented for review, it is the duty of an appellate court to settle jurisdictional issues presented by a case.
4. **Final Orders: Appeal and Error.** Generally, when multiple issues are presented to a trial court for simultaneous disposition in the same proceeding and the court decides some of the issues, while reserving some issue or issues for later determination, the court's determination of less than all the issues is an interlocutory order and is not a final order for the purpose of an appeal.
5. **Appeal and Error.** A notice of appeal from a nonappealable order does not render void for lack of jurisdiction acts of the trial court taken in the interval between the filing of the notice and the dismissal of the appeal by the appellate court.
6. **Final Orders: Appeal and Error.** A party may appeal from a court's order only if the decision is a final, appealable order.

7. **Jurisdiction: Stipulations: Appeal and Error.** Appellate jurisdiction of the subject matter can only be conferred in the manner provided by statute and cannot be conferred by stipulation of the parties.
8. **Jurisdiction: Final Orders: Appeal and Error.** Appellate jurisdiction cannot be conferred by filing an application for review from an interlocutory order.
9. **Appeal and Error: Words and Phrases.** Plain error is error plainly evident from the record and of such a nature that to leave it uncorrected would result in damage to the integrity, reputation, or fairness of the judicial process.

Appeal from the Workers' Compensation Court. Affirmed.

James D. Hamilton and Amanda A. Dutton, of Baylor, Evnen, Curtiss, Grimit & Witt, L.L.P., for appellant.

Hunter A.H. Campbell, of Campbell Law Office, for appellee.

SIEVERS, CARLSON, and CASSEL, Judges.

CASSEL, Judge.

INTRODUCTION

Following trial, the trial court entered an award explicitly reserving certain issues for later determination. Swift Beef Company (Swift) nevertheless filed an application for review. Approximately 2 months later, the trial court resolved the remaining issues, and Swift filed a second application for review, which did not restate or incorporate any of the errors contained in the first application. Swift now appeals from the order of remand of the Nebraska Workers' Compensation Court review panel, which refused to consider the errors Swift raised in its first application. Because Swift's first application sought to appeal from an interlocutory order, it was ineffective and did not divest the trial court of jurisdiction. We affirm the decision of the review panel.

BACKGROUND

The parties stipulated that Brandy S. Morales began working for Swift on September 18, 2002. On February 8, 2005, Morales filed a petition in the Workers' Compensation Court seeking benefits and compensation for medical expenses. She alleged that during her employment with Swift, she suffered

injuries to her neck and hand as a result of repetitive trauma. On October 26, the court conducted a trial.

On March 2, 2006, the trial court entered an award (March award), which stated:

> At the time of trial, there was an argument about [Morales'] average weekly wage. In Exhibit 30, page 2, there is a statement of [Morales'] wages and hours worked. [Swift] added up the hours worked but it is not clear if overtime hours were included or if any holiday pay was included. A further hearing must be held to educate the Court on the parties' positions on how to determine the average weekly wage. It would appear that the hours worked plus overtime should be included at straight time and holiday pay should also be included. For the period ending November 8, 2003, the vacation pay for 40 . . . hours should be included. For the week ending November 15, 2003, perhaps not all of the vacation pay should be included because [Morales] received 40 . . . hours of vacation pay plus 32 . . . hours of straight time. I note that the period ending November 22, 2[0]03, is blank. Perhaps the 40 . . . hours of vacation should have been on that line rather than on the line for November 15, 2003. That would be more consistent because [Morales] did not work the weeks ending November 8, 2003, and November 22, 2003.
>
> On the issue of the amount of temporary benefits, [Morales] is entitled to some temporary benefits but she is not entitled to temporary total benefits from the date of accident until the time of trial. [Swift] is entitled to some relief from payment of temporary total benefits because [Morales] received unemployment benefits and worked for Associated Staffing.
>
> The parties should be prepared to argue and submit additional evidence as to the period of temporary benefits and the amount thereof.
>
> A further hearing will be held on March 8, 2006, . . . to determine [Morales'] average weekly wage and the amount and period of temporary benefits.
>
> . . . .

> [Morales] has not yet reached maximum medical recovery. . . .
>
> Payment of attorney's fees will be decided after determination of average weekly wage and period of weekly benefits.

The court gave Swift credit for payments it had made on medical bills and ordered Swift to pay certain medical expenses along with future medical care expenses.

On March 16, 2006, Swift filed an application for review of the March award and assigned 17 errors. Swift assigned error to, among other things, the court's failure to make a finding on Morales' average weekly wage and entitlement to temporary disability benefits based upon the evidence presented at the time of trial, the court's ordering further hearing on Morales' average weekly wage and temporary benefits following the trial, and the court's failure to find that Morales was not entitled to attorney fees based upon the evidence presented at trial.

The hearing scheduled for March 8, 2006, was continued to March 17 and then ultimately held on April 11. Counsel for Swift objected "to proceeding with the hearing for average weekly wage" and asserted that the issue should have been decided based upon exhibit 30, the evidence on wages that Swift offered at the initial trial. Exhibit 30 showed 909 hours, and counsel for Swift and Morales agreed that was the proper calculation. The court stated it would use exhibit 30 for an average weekly wage of $379.79, and the court then gave counsel an opportunity to argue about whether unemployment benefits earned by Morales affected the average weekly wage. The court did not receive any additional evidence at the April 11 hearing.

On May 17, 2006, the trial court entered an order (May order) which addressed Morales' average weekly wage and entitlement to temporary benefits. The court determined Morales' average weekly wage to be $379.79, entitling her to $253.20 per week for temporary total benefits. The order stated that Morales received unemployment benefits from March 1 through June 30, 2004, and that during that period, she was entitled to $109.86 per week for temporary partial benefits. The court ordered Swift to pay the temporary benefits set forth in the order and ordered

that the March award "is supplemented to show the above temporary benefits."

On May 30, 2006, Swift filed an application for review, assigning as error only the court's finding that Swift was to pay the temporary benefits set forth in the May order. Also on May 30, Swift filed a motion to consolidate the March 16 and May 30 applications for review. On June 13, following a hearing on the same date, a judge of the Workers' Compensation Court different from the trial judge entered an order consolidating the two applications for review.

On November 16, 2006, the review panel entered its order of remand on review. The review panel found that the March award was interlocutory, stated that it regarded the March 16 application for review as a nullity, and determined that the only application properly before it was the May 30 application for review which set forth a single assignment of error. The review panel noted a conflict between the trial court's two orders regarding temporary benefits and remanded the matter to the trial judge for a reasoned decision solely concerning the award of benefits in the May order.

Swift timely appeals to this court.

ASSIGNMENTS OF ERROR

Swift assigns 18 errors on appeal. Swift alleges, consolidated and restated, that the review panel erred in (1) failing to find the March award was a final, appealable order; (2) finding that Swift's March 16, 2006, application for review was a nullity and failing to consider the assignments of error contained therein; and (3) failing to find that the trial court had been divested of jurisdiction following the March 16 filing of the application for review, rendering the trial court's April 11 hearing a nullity.

Swift alleges, consolidated and restated, that the trial court committed plain error in (1) finding that Morales suffered bilateral carpal tunnel syndrome as a result of a work-related accident, (2) finding that Morales suffered an injury to her neck as a result of a work-related accident, (3) admitting into evidence unsigned medical records over Swift's objection, (4) failing to dismiss the petition for failure of proof, (5) failing to make a finding on Morales' average weekly wage based upon

the evidence presented at the time of trial and ordering a further hearing on this issue, (6) failing to make findings with regard to Morales' entitlement to benefits for temporary disability based upon the evidence presented at the time of trial and ordering a further hearing on this issue, (7) finding that Morales was entitled to temporary disability benefits, (8) finding that Morales was entitled to past and future medical benefits for her alleged bilateral carpal tunnel syndrome and neck injury, (9) failing to pass on the issue of whether a reasonable controversy existed, and (10) failing to make a finding on attorney fees based upon the evidence presented at the time of trial.

STANDARD OF REVIEW

[1] Pursuant to Neb. Rev. Stat. § 48-185 (Reissue 2004), an appellate court may modify, reverse, or set aside a Workers' Compensation Court decision only when (1) the compensation court acted without or in excess of its powers; (2) the judgment, order, or award was procured by fraud; (3) there is not sufficient competent evidence in the record to warrant the making of the order, judgment, or award; or (4) the findings of fact by the compensation court do not support the order or award. *Olivotto v. DeMarco Bros. Co.*, 273 Neb. 672, 732 N.W.2d 354 (2007).

[2] In determining whether to affirm, modify, reverse, or set aside a judgment of the Workers' Compensation Court review panel, a higher appellate court reviews the findings of the trial judge who conducted the original hearing. *Id.*

ANALYSIS

Whether March Award Was Final, Appealable Order.

[3,4] Before reaching the legal issues presented for review, it is the duty of an appellate court to settle jurisdictional issues presented by a case. *Merrill v. Griswold's, Inc.*, 270 Neb. 458, 703 N.W.2d 893 (2005). Generally, when multiple issues are presented to a trial court for simultaneous disposition in the same proceeding and the court decides some of the issues, while reserving some issue or issues for later determination, the court's determination of less than all the issues is an interlocutory order and is not a final order for the purpose of an appeal. *Id.* The March award stated that a further hearing would be

held to determine average weekly wage, period of temporary benefits, and attorney fees. Because the March award explicitly reserved certain issues for determination following a later hearing, it was clearly an interlocutory order.

Swift argues that the March award was a final order because the issues reserved for later hearing were ripe for adjudication. Swift contends that the trial court's failure to pass on the issues in order to allow Morales to present additional evidence was tantamount to a finding that Morales failed to meet her burden of proof on the issue. Swift further argues that it had to appeal from the March award in order to preserve an objection to the court's reserving certain issues for a later resolution.

During the initial trial, Swift offered exhibit 30, the only exhibit on Morales' wages. Morales' counsel stated that Morales would testify that she earned $10.50 an hour working a 40-hour week. As the trial court tried to get the parties to agree on average weekly wage, Swift's counsel stated, "[Swift] would ask for leave, Your Honor, to submit a late exhibit that would reflect the stipulation of the parties on average weekly wage." The court responded, "I'll give you a date where you've got to come and you can submit an exhibit where you'll agree. That's what will happen." Swift did not object at that time to a later hearing, but Swift did object at the beginning of the April hearing. Morales did not present any additional evidence at the April hearing, and the court's finding regarding average weekly wage was ultimately based upon exhibit 30. Under these circumstances, any error in reserving a determination on average weekly wage was harmless. Swift's challenge to the propriety of the court's reserving certain issues for later determination would properly have been raised in an appeal from the May order, which order disposed of all claims and was a final, appealable order.

Whether Trial Court Was Divested of Jurisdiction.

[5,6] Swift argues that the trial court did not have jurisdiction to hold a subsequent hearing or enter a later order following Swift's March 16, 2006, application for review. In support of its argument, Swift cites to *Swain Constr. v. Ready Mixed Concrete Co.*, 4 Neb. App. 316, 542 N.W.2d 706 (1996), where this court determined that the trial court lacked jurisdiction to enter an

order dismissing the plaintiff's petition while plaintiff's appeal from a nonfinal order sustaining defendant's demurrer was still before this court. Although the Nebraska Supreme Court has not expressly overruled *Swain Constr.*, in *Holste v. Burlington Northern RR. Co.*, 256 Neb. 713, 592 N.W.2d 894 (1999), the Supreme Court noted that the rule in *Swain Constr.* differed from the rule adopted by a number of jurisdictions and from its decision in *Doolittle v. American Nat. Bank of Omaha*, 58 Neb. 454, 78 N.W. 926 (1899). The *Holste* court proceeded to hold that a notice of appeal from a nonappealable order does not render void for lack of jurisdiction acts of the trial court taken in the interval between the filing of the notice and the dismissal of the appeal by the appellate court. That holding has been reaffirmed by the Supreme Court in *Nebraska Nutrients v. Shepherd*, 261 Neb. 723, 626 N.W.2d 472 (2001); *In re Guardianship & Conservatorship of Woltemath*, 268 Neb. 33, 680 N.W.2d 142 (2004); and *In re Guardianship of Sophia M.*, 271 Neb. 133, 710 N.W.2d 312 (2006), and we are bound to follow it. A party may appeal from a court's order only if the decision is a final, appealable order. *Merrill v. Griswold's, Inc.*, 270 Neb. 458, 703 N.W.2d 893 (2005). Because the March award was not an appealable order, Swift's appeal from that order did not deprive the trial court of jurisdiction. This assignment of error is without merit.

Whether Review Panel Erred in Failing to Address Assignments of Error in First Application for Review After It Consolidated Appeals.

[7,8] Swift argues that the review panel erred in failing to address the 17 assignments of error contained in the March 16, 2006, application for review. Swift claims that the parties stipulated to consolidation of the appeals, but the record does not support this assertion and Morales denies any such stipulation in her brief. Appellate jurisdiction of the subject matter can only be conferred in the manner provided by statute and cannot be conferred by stipulation of the parties. *State v. Murphy*, 15 Neb. App. 398, 727 N.W.2d 730 (2007). Neb. Rev. Stat. §§ 48-179 (Cum. Supp. 2006) and 48-182 (Reissue 2004) each provide for the filing of an application for review within 14 days of a final

order of the workers' compensation court. Appellate jurisdiction cannot be conferred by filing an application for review from an interlocutory order; Swift's March 16 application for review was of no effect. The only application for review filed within 14 days of a final order was the May 30 application for review, and the error contained therein was the only error properly before the review panel.

We cannot discern any reason preventing Swift from simply restating the same errors raised in its first application for review in its second application. Swift cannot claim to have acted in reliance upon the order consolidating the applications for review because that order was filed nearly 2 weeks after Swift filed its second application for review. The review panel ultimately found in its order of remand that Swift's first application for review was taken from an interlocutory order and was a nullity. We agree.

Plain Error.

[9] Finally, Swift alleges that the trial court committed plain error in a multitude of respects. Plain error is error plainly evident from the record and of such a nature that to leave it uncorrected would result in damage to the integrity, reputation, or fairness of the judicial process. *Miller v. Commercial Contractors Equip.*, 14 Neb. App. 606, 711 N.W.2d 893 (2006). After reviewing the record, we found no error so prejudicial that to leave it uncorrected would cause a miscarriage of justice.

CONCLUSION

We conclude that the trial court's March award was not a final order and that Swift's application for review from that award was of no effect and did not divest the trial court of jurisdiction. The errors asserted solely in the first application, which was a nullity, were not repeated or incorporated in the second application, which was the only appeal sufficient to confer jurisdiction upon the review panel. The parties cannot confer subject matter jurisdiction by stipulation. Finding no plain error, we affirm the review panel's decision.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. RODNEY J. PILLARD, APPELLANT.

741 N.W.2d 441

Filed October 30, 2007. No. A-07-298.

1. **Judgments: Trial: Evidence: Proof: Appeal and Error.** In a bench trial of a law action, including a criminal case tried without a jury, erroneous admission of evidence is not reversible error if other relevant evidence, admitted without objection or properly admitted over objection, sustains the trial court's factual findings necessary for the judgment or decision reviewed; therefore, an appellant must show that the trial court actually made a factual determination, or otherwise resolved a factual issue or question, through the use of erroneously admitted evidence in a case tried without a jury.
2. **Evidence: Proof: Presumptions: Appeal and Error.** The burden of showing that the trial court utilized erroneously admitted evidence rests on the appellant because of the presumption that the trial court, sitting as the fact finder, disregards inadmissible evidence.
3. **Ordinances: Appeal and Error.** In the absence of any showing to the contrary, an appellate court assumes that the material allegations in the complaint reflect the substantive content of the ordinances which the defendant was charged with violating.

Appeal from the District Court for Lancaster County, PAUL D. MERRITT, JR., Judge, on appeal thereto from the County Court for Lancaster County, GALE POKORNY, Judge. Judgment of District Court affirmed.

Dennis R. Keefe, Lancaster County Public Defender, Matthew G. Graff, and Joshua J. Pluta, Senior Certified Law Student, for appellant.

Gary E. Lacey, Lancaster County Attorney, and Daniel Packard for appellee.

INBODY, Chief Judge, and IRWIN and MOORE, Judges.

IRWIN, Judge.

I. INTRODUCTION

Rodney J. Pillard appeals the order of the district court for Lancaster County which affirmed his county court conviction and sentence for assault, in violation of the Lincoln municipal ordinances. He asserts that the evidence adduced at trial was insufficient to sustain a conviction, that the county court

erred in admitting hearsay testimony into evidence, and that the county court abused its discretion by imposing a sentence which was excessive and disproportionate to the severity of the offense. We find that the evidence adduced at trial was sufficient to sustain Pillard's conviction for assault; that certain testimony admitted at trial, if it was hearsay, was not shown to have been relied on by the trial judge, who was the trier of fact; and that the county court did not abuse its discretion in sentencing Pillard. In determining that the sentence was not excessive, we hold that the inclusion of Pillard's arraignment proceeding in the record provided us with sufficient language from the relevant ordinance to make review of Pillard's sentence possible. As such, we affirm.

II. BACKGROUND

The State filed a criminal complaint charging Pillard with assault under a Lincoln municipal ordinance. After the conclusion of the trial, the county court found Pillard guilty and sentenced him to 90 days in jail.

Pillard's assault charge stems from an incident which occurred on the afternoon of June 13, 2006, at a home on E Street in Lincoln. Evidence adduced at trial revealed that Pillard and his wife, Donna Pillard (Donna), were arguing about their finances when law enforcement received a report from a passer-by about a possible domestic disturbance in the area of the Pillards' home.

At trial, the State presented the testimony of four witnesses. Because Pillard argues that the evidence at trial was legally insufficient to support his conviction, we recount the evidence presented by each witness in some detail.

The passer-by was the first witness to testify. His testimony revealed that he was doing volunteer work in the area of the Pillards' home during the afternoon hours of June 13, 2006, when he heard yelling and banging noises coming out of a cream-colored house across the street from where he stood. He said that it sounded "like someone throwing a temper" and that he specifically heard a male voice yelling and a sound which resembled someone's hitting a wall repeatedly. He testified that he called the 911 emergency dispatch service after listening

to the noises for 30 seconds and that law enforcement arrived approximately 5 minutes later.

Officer Jennifer Hurley of the Lincoln Police Department then testified that she was dispatched to the Pillards' home on the afternoon of June 13, 2006. Upon arrival, Officer Hurley interviewed Pillard. She testified that Pillard was agitated, was yelling a lot, and was "very vocal, very verbal, very loud." Pillard told Officer Hurley that he and Donna had argued and that Thomas Angell, Donna's 24-year-old son, became involved. He also told Officer Hurley that he and Angell got into a physical fight and that Angell grabbed the glasses off of his face and broke them. Pillard specifically denied pushing Donna.

Officer Hurley testified that after she spoke with Pillard, she interviewed Donna, who was "upset, very emotional[, and a]ppeared to have been crying." Officer Hurley said that she observed some redness on Donna's chest and neck near where she had a visible scar, but that Donna declined medical attention.

Donna then testified that she and Pillard had argued intermittently for 2 days about their finances and that on the afternoon of June 13, 2006, the argument resurfaced. Donna testified that the two of them were in their living room and "[Pillard] was standing in front of the entertainment center and [she] was sitting in [her] reclining chair." Donna also said that Pillard "wasn't screaming or anything," but that he "was just arguing." Donna testified that Angell overheard the argument from upstairs and came down to check on her. She told the court that 8 months prior to this event, she underwent open heart surgery, and that Angell was concerned about her health and about keeping her stress level to a minimum.

Donna testified that when Angell came down the stairs, he stood directly in front of Pillard and the two started to yell at each other. Donna testified that she then stood up and attempted to intervene, but that Pillard prevented her from doing so by putting his arm out in front of her. Donna testified that Pillard's hand made contact with her shoulder, but that she did not feel any pain. Donna said that the argument between Pillard and Angell subsided after about 3 minutes and that Angell then went outside to get in his car to go "cool off." At this time, police stopped him.

Angell testified next. He said that he was taking a nap that afternoon and awoke to raised voices and arguing downstairs. He testified that he went downstairs to see what was going on and observed Pillard and Donna sitting approximately 10 feet apart. Angell said that he attempted to calm things down so that he could go back to sleep, but that he and Pillard began to argue. He testified that the argument was not physical. Angell said he observed Pillard put his arm out in front of Donna when she tried to intervene, but he reported that Pillard's hand remained "a foot or two away" from her body. He testified that Donna was crying during the argument, but that he was never concerned about her safety or health.

At the close of evidence, the court found Pillard guilty of assault under the ordinance and sentenced him to 90 days in jail. Pillard appealed to the district court, which affirmed the conviction and sentence on March 5, 2007. This appeal followed.

III. ASSIGNMENTS OF ERROR

Pillard has assigned three errors on appeal. He asserts that the evidence was insufficient to sustain a conviction, that the county court erred in admitting hearsay testimony into evidence, and that the county court abused its discretion by imposing a sentence which was excessive.

IV. ANALYSIS

1. Sufficiency of Evidence

Pillard first asserts that the evidence adduced at trial was insufficient to sustain his conviction. The basis for Pillard's argument is that the trial judge misstated some of the relevant facts in his pronouncement of the verdict. We find that there was sufficient evidence adduced at trial to sustain Pillard's conviction, despite the judge's recitation of any inaccurate facts. As such, we affirm.

Regardless of whether the evidence is direct, circumstantial, or a combination thereof, and regardless of whether the issue is labeled as a failure to direct a verdict, insufficiency of the evidence, or failure to prove a prima facie case, the standard is the same: In reviewing a criminal conviction, an appellate court does not resolve conflicts in the evidence, pass on the

credibility of witnesses, or reweigh the evidence; such matters are for the finder of fact, and a conviction will be affirmed, in the absence of prejudicial error, if the evidence admitted at trial, viewed and construed most favorably to the State, is sufficient to support the conviction. *State v. White*, 272 Neb. 421, 722 N.W.2d 343 (2006).

Pillard was charged with assault under § 9.12.010 of the Lincoln Municipal Code, and we note that the language of this section is provided to us by the inclusion of the long-form complaint in the transcript. The relevant language of the code makes it unlawful to knowingly or intentionally threaten a person in a menacing manner or to put a person in fear or apprehension of imminent bodily harm. The evidence in this case, although largely circumstantial, was sufficient to support the trial court's finding that Pillard "threatened Donna . . . in a menacing manner and/or put her in fear of what was going to happen to her." Viewed and construed most favorably to the State, the record indicates the following:

On the afternoon of June 13, 2006, Pillard and Donna were having an argument about their finances in the living room of their home. The argument was so loud that a passer-by who was across the street from the house heard yelling and a sound which he described as resembling someone's hitting a wall repeatedly. The passer-by was concerned and quickly called police.

Donna's son, Angell, also heard the argument from his upstairs bedroom and came downstairs to see what was happening. Once downstairs, Angell became very angry with Pillard, and the two began to argue. Their argument then became physical, and Pillard reported to police that Angell pushed him, pulled the glasses off of his face, and broke them.

When law enforcement arrived, Pillard was still very agitated and very angry. Donna was still emotional and upset and appeared to have been crying. Officer Hurley reported that Donna had redness on her neck and chest.

Despite any misstatement of facts by the trial court, the totality of the evidence presented was sufficient to provide a basis for the court to conclude that Pillard and Donna were engaged in an argument and that Pillard threatened Donna in a menacing manner or placed her in fear or apprehension of imminent

bodily harm. As a result, we find that there was sufficient evidence to support Pillard's conviction for assault, and we find no merit to this assignment of error.

2. Hearsay

Pillard next asserts that the trial court erred by admitting hearsay testimony into evidence over his objection. We find that even if the testimony at issue is hearsay, there is no evidence that the court relied on it in finding Pillard guilty of assault. As such, we determine that the admission of the testimony did not constitute reversible error.

In proceedings where the Nebraska rules of evidence apply, the admissibility of evidence is controlled by the Nebraska Evidence Rules; judicial discretion is involved only when the rules make discretion a factor in determining admissibility. *State v. Kuehn*, 273 Neb. 219, 728 N.W.2d 589 (2007).

The specific line of questioning Pillard alleges is inadmissible hearsay is as follows:

> [Prosecutor:] You said that [Pillard] denied pushing her. When you said her, are you referring to Donna . . . ?
>
> [Officer Hurley:] Yes, his wife.
>
> [Prosecutor:] An allegation was a push?
>
> [Officer Hurley:] Yes.
>
> [Defense counsel]: Objection, Judge. That calls for hearsay.
>
> THE COURT: Overruled.

Pillard alleges that the affirmative answer to the question, "An allegation was a push?" is "clearly hearsay" because though the identity of the declarant who alleged such a push is unclear, the context of the statement makes it obvious that the statement is not that of the testifying witness. Brief for appellant at 10.

[1,2] Assuming without concluding that this statement did constitute hearsay and should have been ruled inadmissible, we still cannot say that the admission of the statement amounts to reversible error. In a bench trial of a law action, including a criminal case tried without a jury, erroneous admission of evidence is not reversible error if other relevant evidence, admitted without objection or properly admitted over objection, sustains the trial court's factual findings necessary for the judgment or

decision reviewed; therefore, an appellant must show that the trial court actually made a factual determination, or otherwise resolved a factual issue or question, through the use of erroneously admitted evidence in a case tried without a jury. *State v. Harms*, 264 Neb. 654, 650 N.W.2d 481 (2002) (supplemental opinion). The Nebraska Supreme Court has further explained that the burden of showing that the trial court utilized the erroneously admitted evidence rests on the appellant because of the presumption that the trial court, sitting as the fact finder, disregards inadmissible evidence. *Id.*

Pillard does not specifically allege that the trial court relied on the allegation that he pushed Donna in finding him guilty of assault. Further, we find no evidence of the court's reliance on this statement in the record. In fact, the trial court specifically stated that it "[did not] have to find that there was any physical contact." Instead, the court found Pillard guilty based on the section of the ordinance which makes it unlawful to threaten someone in a menacing manner or to put someone in fear of imminent harm.

We determine that Pillard has failed to establish that the trial court based the conviction on the alleged hearsay evidence. Furthermore, pursuant to our discussion above, we find that there was sufficient evidence to sustain Pillard's conviction without considering the evidence of the allegation that Pillard pushed Donna. For these reasons, we find that if this testimony was erroneously admitted, the admission did not constitute reversible error.

3. Excessive Sentence

In his last assignment of error, Pillard asserts that the trial court abused its discretion by imposing a sentence which was excessive and disproportionate to the severity of the offense. The State argues that Pillard failed to include in the appellate record the municipal ordinance under which he was sentenced and that we are therefore precluded from reviewing the trial court's sentencing determination. Because we find that the inclusion of Pillard's arraignment proceedings in the bill of exceptions provides us with the substantive content of the relevant ordinance, we review Pillard's allegations that his sentence

was excessive. In so doing, we conclude that the trial court did not abuse its discretion in imposing the sentence.

Sentences within statutory limits will be disturbed by an appellate court only if the sentences complained of were an abuse of judicial discretion. *State v. Walker*, 272 Neb. 725, 724 N.W.2d 552 (2006). An abuse of discretion occurs when a trial court's decision is based upon reasons that are untenable or unreasonable or if its action is clearly against justice or conscience, reason, and evidence. *Id.* When imposing a sentence, a sentencing judge should consider the defendant's (1) age, (2) mentality, (3) education and experience, (4) social and cultural background, (5) past criminal record or record of law-abiding conduct, and (6) motivation for the offense, as well as (7) the nature of the offense, and (8) the amount of violence involved in the commission of the crime. *State v. Thurman*, 273 Neb. 518, 730 N.W.2d 805 (2007).

The first issue that must be addressed concerning our review of Pillard's conviction is his failure to include in the appellate record the municipal ordinance which provides the possible penalties for the crime of assault. The Nebraska Supreme Court has addressed the absence of such ordinances from the record in a different context. In *Steiner v. State*, 78 Neb. 147, 150, 110 N.W. 723, 724 (1907), the court originally articulated the "ordinance rule" when it stated:

> [An appellate] court cannot undertake to notice the ordinances of all the municipalities within its jurisdiction, nor to search the records for evidence of their passage, amendment or repeal. A party relying upon such matters must make them a part of the bill of exceptions, or in some manner present them as a part of the record.

[3] More recently, the court has clarified the ordinance rule to provide that an appellant's responsibility to include an ordinance in the record can be met with a praecipe requesting that a copy of the ordinance be included in the transcript prepared by the clerk of the county court when a notice of appeal is filed. *State v. Bush*, 254 Neb. 260, 576 N.W.2d 177 (1998). The court has also held that this responsibility can be satisfied through the inclusion of a long-form criminal complaint in the transcript. *State v. Hill*, 254 Neb. 460, 577 N.W.2d 259 (1998). In *Hill*,

the court stated: "In the absence of any showing to the contrary, we assume that the material allegations in the complaint reflect the substantive content of the ordinances which [the defendant] was charged with violating . . . ." 254 Neb. at 464-65, 577 N.W.2d at 263.

In this case, Pillard has not provided us with the language of the ordinance under which he was convicted and sentenced. Although the transcript does include a long-form complaint which contains the substantive content of the ordinance which Pillard was charged with violating, there is no mention of the possible penalties for the violation in this complaint.

However, the bill of exceptions does provide a transcription of Pillard's arraignment on this charge where he was advised of the possible penalties for a conviction of assault under the city ordinance. At the arraignment, the prosecutor explained the charges to Pillard and then stated: "The city misdemeanor carries a possible penalty of $200 to $500 fine and up to six months imprisonment." In addition, the trial court advised Pillard as follows: "If you're found guilty of [assault], the penalties include a fine of up to $500, up to six months in jail. There's a minimum fine of $200."

The arraignment language advised Pillard of the possible penalties associated with a conviction for assault. Just as the court in *Hill, supra*, reasoned, absent any showing to the contrary, that the material allegations in the long-form complaint reflected the substantive content of the relevant charging ordinance, we reason that the court's advisement of the possible penalties for violating the assault ordinance reflects the substantive content of the relevant sentencing ordinance. There is no showing by either party that the court did not correctly advise Pillard of the possible penalties at his arraignment. As a result, we find that the inclusion of Pillard's arraignment proceedings in the record provides us with sufficient language reflecting the penalty under the ordinance to make review of Pillard's sentence possible. We now review the record to determine if the court abused its discretion in sentencing Pillard to 90 days in jail.

The conviction for assault is punishable by 0 to 6 months in jail, a fine of $200 to $500, or both. Pillard's sentence of 90 days in jail is clearly within the statutory limits. Our review

of the record indicates that the sentence was not an abuse of discretion.

V. CONCLUSION

We find that the evidence presented at trial was sufficient to support Pillard's conviction and that the admission of the testimony of which Pillard complains, if it was hearsay, did not constitute reversible error. In addition, we find that the inclusion of Pillard's arraignment proceedings in the bill of exceptions provided us with sufficient language from the relevant Lincoln municipal ordinance to make review of his sentence possible. As such, we find that the trial court did not abuse its discretion in sentencing Pillard to 90 days in jail. We therefore affirm the order of the district court which upheld Pillard's conviction and sentence.

AFFIRMED.

WAYNE REINBRECHT, ON BEHALF OF HIMSELF AND ALL OTHERS SIMILARLY SITUATED, APPELLANT, V. WALGREEN CO., DOING BUSINESS AS WALGREENS, APPELLEE.

742 N.W.2d 243

Filed November 6, 2007. No. A-05-1317.

1. **Summary Judgment.** Summary judgment is proper when the pleadings and evidence admitted at the hearing disclose no genuine issue as to any material fact or as to the ultimate inferences that may be drawn from those facts and that the moving party is entitled to judgment as a matter of law.
2. **Summary Judgment: Appeal and Error.** In reviewing a summary judgment, an appellate court views the evidence in a light most favorable to the party against whom the judgment is granted and gives such party the benefit of all reasonable inferences deducible from the evidence.
3. **Deceptive Trade Practices: Equity.** By its own terms, Neb. Rev. Stat. § 87-303(a) (Reissue 1999) provides only for equitable relief consistent with general principles of equity.
4. **Deceptive Trade Practices: Damages.** The Uniform Deceptive Trade Practices Act, specifically Neb. Rev. Stat. § 87-303 (Reissue 1999), does not provide a private right of action for damages.
5. **Appeal and Error.** An appellate court is not obligated to engage in an analysis which is not needed to adjudicate the controversy before it.

Appeal from the District Court for Douglas County: SANDRA L. DOUGHERTY, Judge. Affirmed.

Pamela A. Car, of Car & Reinbrecht, P.C., L.L.O., for appellant.

Mark C. Laughlin and Paul M. Shotkoski, of Fraser, Stryker, Meusey, Olson, Boyer & Bloch, P.C., for appellee.

SIEVERS, CARLSON, and CASSEL, Judges.

CARLSON, Judge.

INTRODUCTION

Wayne Reinbrecht filed a class action against Walgreen Co., doing business as Walgreens (Walgreens), in the district court for Douglas County. Reinbrecht brought the action on behalf of himself and others similarly situated, alleging violations of Nebraska's Uniform Deceptive Trade Practices Act (UDTPA), Neb. Rev. Stat. § 87-301 et seq. (Reissue 1999 & Cum. Supp. 2006), and Nebraska's Consumer Protection Act (CPA), Neb. Rev. Stat. § 59-1601 et seq. (Reissue 2004), in connection with Walgreens' sale of 37-cent U.S. postage stamps to its customers. The trial court granted summary judgment in favor of Walgreens on both claims and dismissed Reinbrecht's amended complaint. For the reasons stated below, we affirm.

BACKGROUND

Walgreens is a corporation that operates drug stores in Nebraska. Walgreens sells U.S. postage stamps in its stores for the convenience of its customers. It sells the stamps in packages of 4, 10, and 20. Walgreens purchases the stamps from a distributor; the distributor purchases the stamps from the U.S. Postal Service, repackages them, and sells the finished product to Walgreens. Walgreens has no relationship or affiliation with the U.S. Postal Service. Walgreens sells the stamps for a price that is more than the amount a customer would pay for the same stamps at a U.S. Post Office facility.

On January 14, 2005, Reinbrecht went to a Walgreens store located in Omaha, Nebraska, and purchased a pack of 10 self-adhesive 37-cent postage stamps, along with other items. The

price of $4.99 and the Walgreens' company logo were printed on the package of stamps Reinbrecht purchased, as well as the description "10 Self-Adhesive Stamps." Reinbrecht paid $4.99 for the package of 10 stamps and received a receipt for his purchase which reflected the $4.99 price for the stamps. The $4.99 price charged by Walgreens for the 10 stamps was $1.29 more than the cumulative face value of the 37-cent stamps.

Reinbrecht claims that on the date he purchased the stamps, the stamp packs were not located in a regular shopping aisle, but, rather, were kept at the checkout counter at a place almost out of reach to customers. He claims that he asked the store clerk for a package of 10 postage stamps and that the clerk "rang it up" and put the stamps in a bag with the other items Reinbrecht purchased. Reinbrecht claims he did not have the opportunity to look at the stamp pack or the amount charged prior to leaving the Walgreens store. He further claims that while in the store, he did not see any prices on either the stamp products or the stamp display.

Walgreens presented evidence to show that its stores follow corporate "planograms," which provide the layout for displaying various products available at Walgreens stores, including postage stamps. For the time period including January 14, 2005, the corporate planogram provided that postage stamps be displayed at the checkout counter in a clear plastic display box with four sections. Each section was labeled with a sticker stating the price and quantity of the corresponding stamp product. The Walgreens store where Reinbrecht purchased the stamps complied with the planogram, including the display of stamp products. However, the actual stamp products were removed from the display box and replaced with "dummy cards." The dummy cards were an accepted Walgreens practice at locations where theft was a concern. The dummy cards advised customers that the stamp products were available at the front register. The dummy cards located in the individual sections of the display box identified the price and quantity of the stamp products. When stamps are purchased, the cash register display shows the price of each stamp package as it is scanned by the clerk, and a receipt is given to the customer showing the price of each stamp package.

On the date Reinbrecht purchased the stamps in question, there were signs in the Walgreens store at issue that stated, "US Postage Stamps Available Here." The signs were displayed on the front door of the Walgreens store, in the "Hallmark" aisle, and near the front register. The signs did not indicate that the stamps were sold at a higher price than their face value.

On March 14, 2005, Reinbrecht filed an amended complaint on behalf of himself and all others similarly situated against Walgreens, alleging that it had violated the UDTPA and the CPA in connection with its practice of selling postage stamps at a higher price than the face value of the 37-cent stamps. Specifically, Reinbrecht alleged that Walgreens' practice causes confusion and is deceiving, because the stamps it sells are identical in appearance to those sold by the U.S. Postal Service, the packaging is substantially similar to the U.S. Postal Service packaging, and Walgreens provides no notice to its customers of the increased charge. Reinbrecht alleged that this was a class action and sought certification of a class.

On April 11, 2005, Walgreens filed a motion to dismiss Reinbrecht's amended complaint. The motion to dismiss was converted to a motion for summary judgment after Reinbrecht submitted an affidavit in opposition to the motion to dismiss and it was received by the court. Both parties were given a reasonable opportunity to present additional material in regard to the motion for summary judgment. Following a hearing on Walgreens' motion for summary judgment, the trial court granted the motion as to both the UDTPA and CPA claims.

This case has not been certified as a class action. By agreement of the parties, Reinbrecht's motion for class certification was continued pending the outcome of the summary judgment motion.

ASSIGNMENTS OF ERROR

In regard to the UDTPA claim, Reinbrecht assigns that the trial court erred in (1) finding that he may not recover damages under the UDTPA, (2) finding that he must show that he is likely to be damaged by Walgreens' deceptive acts in the future, (3) finding that Walgreens' practices did not cause a "'likelihood of confusion,'" (4) finding that Walgreens' practices were not

deceptive as a matter of law, (5) finding that Walgreens does not fall under the scope of the U.S. Postal Service regulations, and (6) granting Walgreens' motion for summary judgment.

In regard to the CPA claim, Reinbrecht assigns that the trial court erred in (1) finding that he must prove that Walgreens' actions are both "'unfair'" and "'deceptive,'" (2) using the wrong definitions of "'unfair'" and "'deceptive,'" and (3) granting Walgreens' motion for summary judgment.

STANDARD OF REVIEW

[1,2] Summary judgment is proper when the pleadings and evidence admitted at the hearing disclose no genuine issue as to any material fact or as to the ultimate inferences that may be drawn from those facts and that the moving party is entitled to judgment as a matter of law. *Alston v. Hormel Foods Corp.*, 273 Neb. 422, 730 N.W.2d 376 (2007); *City of Lincoln v. Hershberger*, 272 Neb. 839, 725 N.W.2d 787 (2007). In reviewing a summary judgment, an appellate court views the evidence in a light most favorable to the party against whom the judgment is granted and gives such party the benefit of all reasonable inferences deducible from the evidence. *Id.*

ANALYSIS

UDTPA.

We first address Reinbrecht's assignments of error that relate to his UDTPA claim. Section 87-302 of the UDTPA provides in pertinent part:

> (a) A person engages in a deceptive trade practice when, in the course of his or her business, vocation, or occupation, he or she:
>
> (1) Passes off goods or services as those of another;
>
> (2) Causes likelihood of confusion or of misunderstanding as to the source, sponsorship, approval, or certification of goods or services;
>
> (3) Causes likelihood of confusion or of misunderstanding as to affiliation, connection, or association with, or certification by, another;
>
> (4) Uses deceptive representations or designations of geographic origin in connection with goods or services;

> (5) Represents that goods or services have sponsorship, approval, characteristics, ingredients, uses, benefits, or quantities that they do not have or that a person has a sponsorship, approval, status, affiliation, or connection that he or she does not have.

The UDTPA also provides that "[a] person likely to be damaged by a deceptive trade practice of another may be granted an injunction against it under the principles of equity and on terms that the court considers reasonable. . . ." § 87-303(a).

Reinbrecht first assigns that the trial court erred in finding that he may not recover damages under the UDTPA. The trial court found that the UDTPA provides only for equitable relief and that therefore, Reinbrecht cannot recover monetary damages under the UDTPA, but, rather, only injunctive relief.

[3,4] By its own terms, § 87-303(a) provides only for equitable relief consistent with general principles of equity. *Sid Dillon Chevrolet v. Sullivan*, 251 Neb. 722, 559 N.W.2d 740 (1997). The UDTPA, specifically § 87-303, does not provide a private right of action for damages. *Triple 7, Inc. v. Intervet, Inc.*, 338 F. Supp. 2d 1082 (D. Neb. 2004). In *Triple 7, Inc.*, the court dismissed the plaintiff's UDTPA claim because the plaintiff did not seek injunctive relief. Accordingly, the trial court in the instant case did not err in finding that Reinbrecht may not recover damages under the UDTPA. Reinbrecht's assignment of error in this regard is without merit.

Reinbrecht next assigns the trial court erred in finding that he must show he is likely to be damaged by Walgreens' deceptive acts in the future and that he failed to do so. The trial court found that summary judgment was appropriate on Reinbrecht's UDTPA claim, because he had not alleged or proved the likelihood of future harm sufficient to assert a viable claim for injunctive relief. We agree.

As previously stated, the UDTPA provides that "[a] person likely to be damaged by a deceptive trade practice of another" can seek an injunction prohibiting such practices. § 87-303(a). Because the UDTPA provides injunctive relief for "a person likely to be damaged," it provides relief from future damage, not past damage. Reinbrecht must present evidence sufficient to support an inference of future harm to him. Reinbrecht now

knows the truth regarding the price of the postage stamps sold by Walgreens. Therefore, any deception or damage to Reinbrecht occurred in the past and Reinbrecht cannot suffer future damages as a result of Walgreens' alleged deceptive practices in regard to its sale of postage stamps. Reinbrecht has not presented any evidence or even alleged that he is "likely to be damaged" by Walgreens' practice in the future. Thus, the evidence does not indicate a likelihood of future harm.

Damage allegedly caused by Reinbrecht's purchase of postage stamps in January 2005 cannot be remedied through an injunction. To survive summary judgment, Reinbrecht had to raise a factual question about the likelihood of some future wrong to him. Because he failed to do so, the trial court properly granted Walgreens' motion for summary judgment on the UDTPA claim.

[5] Having determined that the trial court properly granted summary judgment on the ground that Reinbrecht did not show the likelihood of some future wrong to him, we need not address Reinbrecht's other assignments of error that relate to the UDTPA claim. An appellate court is not obligated to engage in an analysis which is not needed to adjudicate the controversy before it. *Castillo v. Young*, 272 Neb. 240, 720 N.W.2d 40 (2006); *Davis v. Crete Carrier Corp.*, 15 Neb. App. 241, 725 N.W.2d 562 (2006).

CPA.

In regard to Reinbrecht's CPA claim, he first assigns that the trial court erred in finding that he must prove that Walgreens' actions are both "unfair" and "deceptive." Section 59-1602 of the CPA provides, "Unfair methods of competition and unfair or deceptive acts or practices in the conduct of any trade or commerce shall be unlawful."

Reinbrecht's argument is based on a portion of the trial court's order which states that under the CPA, "a Plaintiff must *also* prove that a practice is 'deceptive.'" (Emphasis supplied.) The quoted language is followed by a definition of "deceptive" and is preceded by a definition of "unfair." The quoted language on its own implies that the court mistakenly found that Reinbrecht must prove that Walgreens' actions are both

unfair and deceptive. However, when the court's order is read in its entirety, it is clear that the trial court did not apply such a requirement. The trial court quoted the language in § 59-1602, as set forth above, in its order. It further stated that the principal thrust of the CPA "is to prevent unfair or deceptive acts or practices in trade or commerce." Further, the trial court specifically held that "the manner in which Walgreens sold U.S. postage stamps to [Reinbrecht] is not unfair or deceptive." It is clear that the trial court knew the CPA requires a plaintiff to prove an act is either unfair or deceptive, and not both, and that the trial court applied the proper test in analyzing Reinbrecht's claim under the CPA. Thus, Reinbrecht's assignment that the trial court erred in finding that Reinbrecht must prove that Walgreens' actions are both unfair and deceptive is without merit.

Reinbrecht next assigns that the trial court erred by using the wrong definitions of "unfair" and "deceptive" in analyzing his CPA claim. The trial court relied on definitions found in *Raad v. Wal-Mart Stores, Inc.*, 13 F. Supp. 2d 1003 (D. Neb. 1998). After noting that the terms "unfair" and "deceptive" are not defined in the CPA and that no Nebraska case law defines the terms as used in the CPA, the *Raad* court stated that an unfair trade practice is one that is immoral, unethical, oppressive, or unscrupulous. It defined a deceptive practice as one which possesses the tendency or capacity to mislead, or creates the likelihood of deception, and that fraud, misrepresentation, and similar conduct are examples of what is prohibited.

Reinbrecht contends that the trial court should not have relied on the definitions in *Raad v. Wal-Mart Stores, Inc., supra*, because that case, unlike the present case, was a dispute between two merchants. Reinbrecht contends that the *Raad* court indicated that the definitions of "unfair" and "deceptive" may be more expansive when the dispute is between a retail consumer and a merchant. Thus, Reinbrecht argues that by relying on the definitions set forth in *Raad*, the trial court failed to apply the appropriate definitions of these terms.

Although Reinbrecht claims that the trial court used the wrong definitions of "unfair" and "deceptive," he fails to cite any authority suggesting alternate definitions; nor does he offer

any alternative definitions whatsoever. We cannot conclude that the definitions of "unfair" and "deceptive" used by the court were faulty or that there were more appropriate definitions that it could have applied. We find no merit to Reinbrecht's assignment of error in regard to the court's definitions of "unfair" and "deceptive."

Finally, Reinbrecht assigns that the trial court erred in granting Walgreens' motion for summary judgment in regard to the CPA claim. The trial court found that Walgreens' method of selling postage stamps to Reinbrecht was not unfair or deceptive.

The evidence is uncontroverted that Walgreens advised its customers that U.S. postage stamps were available for sale and that it sold authentic U.S. postage stamps. The price was shown on the packages, the price stickers on the stamp display, the cash register display, and the receipt given to the customer. Thus, Walgreens provided information about the price before and at the time of sale such that any customer could discern the amount of the markup.

Reinbrecht claims that while in the Walgreens store, he did not see any prices on the stamp products or stamp display. However, the package of stamps Reinbrecht purchased clearly stated a price of $4.99 and stated that it contained 10 stamps. Further, Reinbrecht does not contest that the cash register display showed the price for the stamps when the clerk scanned the package. In addition, the receipt given to Reinbrecht stated a price of $4.99.

Viewing all the evidence in a light most favorable to Reinbrecht, there is no genuine issue of material fact regarding how Walgreens sold U.S. postage stamps. Based on the uncontroverted evidence, we agree with the trial court that Walgreens' method and manner of selling U.S. postage stamps on January 14, 2005, was neither unfair nor deceptive. Walgreens was entitled to judgment as a matter of law on Reinbrecht's CPA claim. Reinbrecht's final assignment of error is without merit.

CONCLUSION

We conclude that the trial court did not err in granting summary judgment in favor of Walgreens on Reinbrecht's UDTPA and CPA claims and in dismissing his amended complaint

with prejudice. Accordingly, the judgment of the trial court is affirmed.

AFFIRMED.

SHARON K. CAIN, APPELLEE, V. DONALD L. CAIN, APPELLANT.
741 N.W.2d 448

Filed November 6, 2007. No. A-06-747.

1. **Statutes: Appeal and Error.** Statutory interpretation presents a question of law. When reviewing questions of law, an appellate court resolves the questions independently of the conclusions reached by the trial court.
2. **Modification of Decree: Child Support.** Neb. Rev. Stat. § 42-371.01 (Reissue 2004) permits the district court, under specified circumstances, to enter a summary order of termination of child support in the absence of an objection by the obligee.
3. ____: ____. The filing of a deficient application under Neb. Rev. Stat. § 42-371.01 (Reissue 2004) will not trigger a duty on the part of the obligee to file a corresponding objection.

Appeal from the District Court for Douglas County: JOHN D. HARTIGAN, JR., Judge. Affirmed.

Larry R. Demerath, of Demerath Law Offices, for appellant.

Michael B. Lustgarten, of Lustgarten & Roberts, P.C., L.L.O., for appellee.

CARLSON, MOORE, and CASSEL, Judges.

MOORE, Judge.

INTRODUCTION

Donald L. Cain appeals from the order of the district court for Douglas County dismissing his application for termination of child support. For the reasons set forth below, we affirm the district court's order. Pursuant to this court's authority under Neb. Ct. R. of Prac. 11B(1) (rev. 2006), this case was ordered submitted without oral argument.

STATEMENT OF FACTS

Donald and Sharon K. Cain were married in 1973 and divorced in 1994. Three children were born to their marriage.

When the dissolution decree was modified in 2001, Donald was required to pay child support for one child—Jena, born July 2, 1985—"until the minor child reaches her majority, dies, becomes emancipated, or until further order of the Court." On September 4, 2003, Donald filed an application to terminate his child support obligation, citing Neb. Rev. Stat. § 42-371.01 (Reissue 2004), which statute governs termination of an obligor's duty to pay child support. Donald asserted that Jena became emancipated when she moved out of Sharon's home and into her own residence on or about August 8, 2003, and gained full-time employment. Donald provided Sharon's last known address and requested that she be notified of his motion in accordance with § 42-371.01.

The record shows no further action in the case until May 2006, when Sharon filed a motion to dismiss on the bases of Donald's failure to state a claim and the insufficiency of service of process. Following a hearing, the district court granted the dismissal motion, finding that Donald had not properly invoked § 42-371.01 to terminate his child support obligation and that he had not obtained service on Sharon such that he could, in the alternative, maintain an action to modify the parties' decree. Donald appeals from this order.

ASSIGNMENT OF ERROR

Donald claims, summarized, that the district court erred in failing to terminate his child support obligation as of October 1, 2003.

STANDARD OF REVIEW

[1] Statutory interpretation presents a question of law. When reviewing questions of law, an appellate court resolves the questions independently of the conclusions reached by the trial court. *Wilczewski v. Neth*, 273 Neb. 324, 729 N.W.2d 678 (2007).

ANALYSIS

Donald claims that pursuant to § 42-371.01, his child support obligation should have been terminated. Section 42-371.01(1) provides:

> An obligor's duty to pay child support for a child terminates when (a) the child reaches nineteen years of age, (b) the child marries, (c) the child dies, or (d) the child is emancipated by a court of competent jurisdiction, unless the court order for child support specifically extends child support after such circumstances.

Section 42-371.01(3) further states:

> The obligor may provide written application for termination of a child support order when the child being supported reaches nineteen years of age, marries, dies, or is otherwise emancipated. The application shall be filed with the clerk of the district court where child support was ordered. *A certified copy of the birth certificate, marriage license, death certificate, or court order of emancipation shall accompany the application for termination of the child support.* The clerk of the district court shall send notice of the filing of the child support termination application to the last-known address of the obligee. The notice shall inform the obligee that if he or she does not file a written objection within thirty days after the date the notice was mailed, child support may be terminated without further notice. The court shall terminate child support if no written objection has been filed within thirty days after the date the clerk's notice to the obligee was mailed, the forms and procedures have been complied with, and the court believes that a hearing on the matter is not required.

(Emphasis supplied.)

It is undisputed that Donald filed his application with the clerk of the district court, who sent notice to Sharon's last known address, along with the admonition that failure to file a written objection within 30 days may result in termination of child support. However, Donald acknowledges that he did not accompany the application with a court order of emancipation. He concedes, in fact, that there was no such order in existence. Instead, he argues that (1) if a court order of emancipation already existed, there would be no need to follow the procedure outlined in § 42-371.01, and (2) Sharon waived any objection she might have had to his application when she failed to file a written objection with the court within 30 days.

[2] We find Donald's arguments unpersuasive. Section 42-371.01 permits the district court, under specified circumstances, to enter a summary order of termination of child support in the absence of an objection by the obligee. There is no ambiguity in the statute's terms, which permit the child support obligor to terminate his or her obligation by filing in the district court an application--which application "shall" be accompanied by a self-authenticating document. Thus, in the present case, Donald was required to accompany his application for termination of child support with a certified copy of a court order of emancipation—an order that did not exist. His bare assertions in his application that Jena was emancipated were insufficient to invoke the provisions of § 42-371.01.

[3] Donald argues that Sharon nonetheless waived any deficiency in his application because she failed to file a written objection within 30 days after his notice was mailed. The provisions in § 42-371.01(3) are again quite clear that the court shall terminate child support if no such objection is filed within 30 days, "*the forms and procedures have been complied with*, and the court believes that a hearing on the matter is not required." (Emphasis supplied.) As described above, Donald failed to comply with the procedures required by § 42-371.01. It follows that Donald's deficient filing failed to trigger an obligation on Sharon's part to file an objection.

Finally, Donald contends that the district court erred in finding that an application to modify the decree was the appropriate vehicle to terminate his child support obligation. The court observed that given Donald's failure to properly invoke § 42-371.01, his application to terminate child support should be treated as an application to modify the decree. The court merely advised Donald that under the present set of facts, formal process must be initiated, including service of process. The court did not err in so doing.

CONCLUSION

The district court properly dismissed Donald's motion to terminate child support due to his failure to comply with § 42-371.01. The district court's order of dismissal is affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. STEVE STOLEN, APPELLANT.

741 N.W.2d 168

Filed November 6, 2007. No. A-06-1216.

1. **Convictions: Evidence: Appeal and Error.** Regardless of whether the evidence is direct, circumstantial, or a combination thereof, and regardless of whether the issue is labeled as a failure to direct a verdict, insufficiency of the evidence, or failure to prove a prima facie case, the standard is the same: In reviewing a criminal conviction, an appellate court does not resolve conflicts in the evidence, pass on the credibility of witnesses, or reweigh the evidence; such matters are for the finder of fact, and a conviction will be affirmed, in the absence of prejudicial error, if the evidence admitted at trial, viewed and construed most favorably to the State, is sufficient to support the conviction.
2. **Judgments: Appeal and Error.** On a question of law, an appellate court is obligated to reach a conclusion independent of the determination reached by the court below.
3. **Criminal Law: Intent.** Under Neb. Rev. Stat. § 28-901(1) (Reissue 1995), a person commits the offense of obstructing government operations if he intentionally obstructs, impairs, or perverts the administration of law or other governmental functions by force, violence, physical interference or obstacle, breach of official duty, or any other unlawful act, except that this section does not apply to flight by a person charged with crime, refusal to submit to arrest, failure to perform a legal duty other than an official duty, or any other means of avoiding compliance with law without affirmative interference with governmental functions.
4. **Criminal Law: Evidence: Intent.** When the sufficiency of the evidence as to criminal intent is in issue, a direct expression of intention by the actor is not required, because the intent with which an act is committed involves a mental process and intent may be inferred from the words and acts of the defendant and from the circumstances surrounding the incident.
5. **Criminal Law: Intent.** An affirmative act of physical interference with government operations violates Neb. Rev. Stat. § 28-901(1) (Reissue 1995) unless explicitly excepted, whether or not physical violence is involved.
6. **Criminal Law: Intent: Police Officers and Sheriffs.** Under Neb. Rev. Stat. § 28-901(1) (Reissue 1995), neither the failure to volunteer information nor words intended to frustrate law enforcement are a physical act that violates the statute.

Appeal from the District Court for Dakota County, WILLIAM BINKARD, Judge, on appeal thereto from the County Court for Dakota County, DOUGLAS LUEBE, Judge. Judgment of District Court affirmed.

Robert B. Deck for appellant.

Jon Bruning, Attorney General, and Erin E. Leuenberger for appellee.

SIEVERS, CARLSON, and CASSEL, Judges.

SIEVERS, Judge.

Steve Stolen was convicted of obstructing government operations under Neb. Rev. Stat. § 28-901(1) (Reissue 1995). Stolen claims his actions of cleaning and removing alcohol containers from a campsite, where a young man had died, do not rise to the level of physical interference contemplated by § 28-901(1). Therefore, Stolen argues that the county court convicted him upon insufficient evidence. We find that Stolen's actions did rise to the level of physical interference contemplated by § 28-901(1), and we affirm his conviction.

FACTUAL AND PROCEDURAL BACKGROUND

On July 3, 2005, Stolen was camping with a group of friends on the property of Bradley Jochum, which property was located on the Missouri River in Dakota County. Accompanying Stolen was a group of about 12 people, including three minors, one of whom was Ken Willis, Jr., age 17. Stolen's group had arrived by boat via the river. A second group of campers, friends of Jochum, were also camping at the site. The two groups interacted, engaging in activities such as shooting fireworks, playing volleyball, and arm wrestling. Throughout the night of July 3 and into the early morning of July 4, both groups, including the minors in Stolen's group, were consuming alcohol.

At approximately 2 a.m. on July 4, 2005, Stolen went to sleep in his tent. Around 6 a.m., he was awakened by another camper, Kingsley James, who informed him that Willis had been found dead. The campers began to panic about the fact that there had been minors consuming alcohol and that one of those minors was now dead. The campers, including Stolen, began cleaning the campsite. Empty alcohol containers were placed into the boat of one of the campers, and then several of the campers left the campsite in the boat.

The owner of the property, Jochum, was informed that Willis had died, and Jochum called the authorities. Stolen, along with other remaining campers, continued cleaning the campsite, including the area where Jochum's group had camped, placing items such as beer cans and other alcohol containers into plastic

garbage bags and placing the bags into the back of a pickup truck. Around 6:30 a.m., a deputy from the Dakota County Sheriff's Department arrived at the site. The deputy noted that the campers appeared to be intoxicated or hung over but that the campsite was unusually clean. The deputy expected to find more alcohol containers and trash than he did.

Ultimately, the State filed a complaint in the county court for Dakota County charging Stolen with one count of obstructing government operations and one count of procuring alcohol for a minor. In a jury trial, Stolen was found guilty of obstructing government operations and not guilty of procuring alcohol for a minor. Stolen appealed the county court's judgment to the district court for Dakota County, which affirmed the judgment of the county court. Stolen timely appealed.

ASSIGNMENTS OF ERROR

Stolen assigns and argues, restated, the following errors: (1) that there was no physical act committed which supports a conviction for obstructing government operations and (2) that he was convicted of obstructing government operations based on insufficient evidence of an underlying unlawful act. While other assignments of error were made, the above two assignments are the only ones actually argued, and therefore they are the only assignments that we will consider. To be considered by an appellate court, an alleged error must be both specifically assigned and specifically argued in the brief of the party assigning the error. *Eicher v. Mid America Fin. Invest. Corp.*, 270 Neb. 370, 702 N.W.2d 792 (2005).

STANDARD OF REVIEW

[1] Regardless of whether the evidence is direct, circumstantial, or a combination thereof, and regardless of whether the issue is labeled as a failure to direct a verdict, insufficiency of the evidence, or failure to prove a prima facie case, the standard is the same: In reviewing a criminal conviction, an appellate court does not resolve conflicts in the evidence, pass on the credibility of witnesses, or reweigh the evidence; such matters are for the finder of fact, and a conviction will be affirmed, in the absence of prejudicial error, if the evidence admitted at trial,

viewed and construed most favorably to the State, is sufficient to support the conviction. *State v. Johnson*, 261 Neb. 1001, 627 N.W.2d 753 (2001).

[2] On a question of law, an appellate court is obligated to reach a conclusion independent of the determination reached by the court below. *State v. Contreras*, 268 Neb. 797, 688 N.W.2d 580 (2004).

ANALYSIS

State Produced Sufficient Evidence of Obstructing Government Operations; Stolen Committed Physical Act as Contemplated by § 28-901(1).

[3] Section 28-901(1) states as follows:

> A person commits the offense of obstructing government operations if he intentionally obstructs, impairs, or perverts the administration of law or other governmental functions by force, violence, physical interference or obstacle, breach of official duty, or any other unlawful act, except that this section does not apply to flight by a person charged with crime, refusal to submit to arrest, failure to perform a legal duty other than an official duty, or any other means of avoiding compliance with law without affirmative interference with governmental functions.

[4] Stolen's intent to obstruct government operations was established by circumstantial evidence. "A direct expression of intention by the actor is not required because the intent with which an act is committed involves a mental process and intent may be inferred from the words and acts of the defendant and from the circumstances surrounding the incident." *State v. Curlile*, 11 Neb. App. 52, 58, 642 N.W.2d 517, 522 (2002). James testified that after discovering Willis had died, the campers became concerned that minors had been drinking alcohol at the campsite and that if law enforcement officers were to arrive, they would see that the campsite was littered with beer cans. It was based on this concern that Stolen removed alcohol containers from the campsite, according to both James and Jochum. It can be inferred from these circumstances that Stolen's intent was to prevent law enforcement from knowing that minors had been consuming alcohol at the campsite. These

actions, when viewed in the light most favorable to the State as we must, demonstrate that Stolen intended to obstruct government operations.

Stolen committed the "physical interference" contemplated by § 28-901 when he cleaned the campsite and removed the alcohol containers. Stolen asserts that his removal of alcohol containers and trash does not rise to the level of physical interference contemplated by the statute. Stolen supports this assertion by citing *State v. Fahlk*, 246 Neb. 834, 524 N.W.2d 39 (1994). In *Fahlk*, a school superintendent produced a falsified document which concealed that he had taken a computer printer belonging to the school for his daughter to use. The Nebraska Supreme Court said that these actions lacked "the element of force or violence contemplated by § 28-901." *State v. Fahlk*, 246 Neb. at 854, 524 N.W.2d at 53.

[5] However, neither *Fahlk* nor the case law that has followed provides an analysis as to what degree of force or violence rises to the level contemplated by § 28-901, nor did the *Fahlk* opinion address the "physical interference" or "obstacle" component of the statute. The Model Penal Code and Commentaries § 242.1, comment 3 at 204 (1980), discusses the physical interference aspect of its obstructing government operations provision, which is identical to the statute at issue in all material aspects, saying that "the section reaches any affirmative act of physical interference not explicitly excepted, whether or not violence is involved." A case cited in a footnote to § 242.1 demonstrates that violence is not necessary for a violation of the statute. See *Johnson v. State ex rel. Maxcy*, 99 Fla. 1311, 128 So. 853 (1930) (frustrating fruit inspector's test by salting sample of orange juice).

[6] In 2006, the Nebraska Supreme Court said that what *Fahlk* established in regard to the element of physical interference in § 28-901 was that "neither the failure to volunteer information nor words intended to frustrate law enforcement are a physical act that violates § 28-901." *Nebraska Legislature on behalf of State v. Hergert*, 271 Neb. 976, 1009, 720 N.W.2d 372, 398 (2006).

Here, Stolen's acts were not simply words or a failure to volunteer information. Instead, Stolen's cleaning of the campsite

and removal of alcohol containers were obviously physical acts as referenced in *Hergert, supra*, and as such, they fall within the plain language of § 28-901. By the physical act of cleaning the campsite and removing alcohol containers, Stolen clearly intended to interfere with the Dakota County Sheriff's Department's investigation into the death of Willis, which investigation Stolen knew was about to occur. The evidence was that for a proper investigation of Willis' death, the scene should not be disturbed before law enforcement arrives, because doing so interferes with the investigation of the death and its circumstances. There is sufficient evidence in the record to support the trial court's conviction of Stolen for obstructing government operations.

Stolen's Conviction of Obstructing Government Operations Is Not Based on Independent Unlawful Act.

Stolen's brief discusses whether Stolen's conviction of obstructing government operations was supported by an independent unlawful act. However, because we have found that Stolen's conviction is supported by his physical interference with the campsite, which in turn interfered with the investigation into Willis' death, it is unnecessary to determine whether Stolen committed any other unlawful acts that would support his conviction for obstructing government operations or whether the jury was properly instructed on such a matter.

CONCLUSION

When Stolen cleaned his campsite and removed alcohol containers from it, he committed a physical act that interfered with the Dakota County Sheriff's Department's investigation of the death of Willis. The State produced sufficient evidence to support Stolen's conviction of obstructing government operations.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. STEPHEN C. KUHL, APPELLANT.

741 N.W.2d 701

Filed November 6, 2007. No. A-06-1393.

1. **Criminal Law: Courts: Appeal and Error.** In an appeal of a criminal case from the county court, the district court acts as an intermediate court of appeal, and as such, its review is limited to an examination of the county court record for error or abuse of discretion.
2. **Courts: Appeal and Error.** Both the district court and a higher appellate court generally review appeals from the county court for error appearing on the record.
3. **Judgments: Appeal and Error.** When reviewing a judgment for errors appearing on the record, an appellate court's inquiry is whether the decision conforms to the law, is supported by competent evidence, and is neither arbitrary, capricious, nor unreasonable.
4. **Criminal Law: Pretrial Procedure.** Discovery in a criminal case is generally, and in the absence of a constitutional requirement, controlled by either a statute or court rule.
5. **Pretrial Procedure: Appeal and Error.** A trial court is vested with broad discretion in considering discovery requests of defense counsel, and error can be predicated only upon an abuse of discretion.
6. **Judgments: Words and Phrases.** An abuse of discretion occurs when a trial court's decision is based upon reasons that are untenable or unreasonable or if its action is clearly against justice or conscience, reason, and evidence.
7. **Statutes: Appeal and Error.** Statutory interpretation presents a question of law, for which an appellate court has an obligation to reach an independent conclusion irrespective of the determination made by the court below.
8. ____: ____. Statutory language is to be given its plain and ordinary meaning, and an appellate court will not resort to interpretation to ascertain the meaning of statutory words which are plain, direct, and unambiguous.
9. **Words and Phrases.** As a general rule, the word "shall" is considered mandatory and is inconsistent with the idea of discretion.
10. **Constitutional Law: Criminal Law: Statutes: Demurrer.** In order to bring a constitutional challenge to the facial validity of a criminal statute, the proper procedure is to file a motion to quash or a demurrer.
11. **Constitutional Law: Statutes: Pleas: Waiver.** Once a defendant has entered a plea, or a plea is entered for the defendant by the court, the defendant waives all facial constitutional challenges to a statute unless that defendant asks leave of the court to withdraw the plea and thereafter files a motion to quash.
12. **Pleas: Appeal and Error.** Prior to sentencing, the withdrawal of a plea forming the basis of a conviction is addressed to the discretion of the trial court, and its ruling will not be disturbed on appeal absent an abuse of that discretion.
13. **Trial: Expert Witnesses: Appeal and Error.** The admission of expert testimony is ordinarily within the discretion of the trial court, and its ruling will be upheld in the absence of an abuse of discretion.

14. **Evidence: Words and Phrases.** Evidence is relevant when it has any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.
15. **Rules of Evidence: Appeal and Error.** The exercise of judicial discretion is implicit in determinations of relevancy under Neb. Rev. Stat. § 27-401 (Reissue 1995) and prejudice under Neb. Rev. Stat. § 27-403 (Reissue 1995), and a trial court's decision under these evidentiary rules will not be reversed absent an abuse of discretion.
16. **Trial: Expert Witnesses.** Triers of fact are not required to take opinions of experts as binding upon them.
17. **Criminal Law: Convictions: Evidence: Appeal and Error.** In reviewing a criminal conviction, an appellate court does not resolve conflicts in the evidence, pass on the credibility of witnesses, or reweigh the evidence. Such matters are for the finder of fact, and a conviction will be affirmed, in the absence of prejudicial error, if the properly admitted evidence, viewed and construed most favorably to the State, is sufficient to support the conviction.
18. **Drunk Driving: Blood, Breath, and Urine Tests: Time.** Matters of delay between driving and testing go to the weight of the breath test results, rather than to the admissibility of the evidence.
19. ____: ____: ____. A valid breath test given within a reasonable time after the accused was stopped is probative of a violation of the driving under the influence statute.
20. **Sentences: Probation and Parole.** When a court sentences a defendant to probation, it may impose any conditions of probation that are authorized by statute.
21. ____: ____. The sentencing court may impose such reasonable conditions of probation as it deems necessary or likely to ensure that the offender will lead a law-abiding life.

Appeal from the District Court for Douglas County, J. PATRICK MULLEN, Judge, on appeal thereto from the County Court for Douglas County, STEPHEN M. SWARTZ, Judge. Judgment of District Court affirmed.

Steven Lefler, of Lefler Law Office, for appellant.

Paul D. Kratz, Omaha City Attorney, Martin J. Conboy III, Omaha City Prosecutor, and J. Michael Tesar for appellee.

INBODY, Chief Judge, and CARLSON and MOORE, Judges.

MOORE, Judge.

INTRODUCTION

Stephen C. Kuhl was convicted in the county court for Douglas County of speeding and driving under the influence (DUI). Kuhl appealed his convictions to the district court, which

affirmed the "judgment of conviction and sentence" entered by the county court. Because we find that the county court's decisions conform to the law, are supported by competent evidence, and are neither arbitrary, capricious, nor unreasonable, we affirm the district court's affirmance of Kuhl's "judgment of conviction and sentence."

BACKGROUND

On July 29, 2005, Kuhl was charged with speeding, in violation of Neb. Rev. Stat. § 60-6,186 (Reissue 2004), and with DUI, in violation of an Omaha city ordinance.

On September 13, 2005, Kuhl filed a motion seeking an order compelling the State to provide Kuhl with (1) any modifications or repairs conducted on the "breath machine" used in this case, (2) the "'Owner's Manual' for the subject machine," and (3) the "electrical and computer component configuration, including, but not limited to, software, power supplies, processor boards, pressure switches, Z80 chips, display boards and mortar boards of the breath testing device upon which [Kuhl] was tested."

The county court heard Kuhl's motion on September 29, 2005, and we have set forth the details of the hearing as relevant to this appeal in the analysis section below. The court entered an order on October 4, ruling on Kuhl's motion. With respect to the first two paragraphs of the motion, which had requested documentation and information on the "breath machine," the court granted Kuhl's motion. The court ordered the State to produce, on or before October 26, documentation regarding modifications and repairs on the machine used to obtain a breath sample from Kuhl in this case at the time of his arrest as well as the owner's manual and any other operator's or usage manuals relating to the machine.

With respect to Kuhl's request that the State provide "electrical and computer component configuration," the county court noted that the State was unable, at the hearing, to provide the court with any information as to whether it or the Omaha Police Department was in possession of any such information or documentation. Accordingly, the court ordered the State to file with the court, on or before October 26, 2005, a written report advising the court and Kuhl as to whether any such documentation

existed. The State subsequently filed a report that it had the owner's manual and documentation concerning modifications or repairs to the breath machine, which it would produce to Kuhl, but that it did not have the "electrical and computer component configuration" information requested.

A hearing was conducted before the county court on November 17, 2005, to determine whether any further items as requested in Kuhl's motion should be produced by the State. During this hearing, the "electrical and computer component configuration" information being sought by Kuhl was described as the "source code" for the machine. The court asked Kuhl's attorney to explain further what he meant by the source code. Kuhl's attorney responded:

> My understanding, Judge, is that it's the DNA of a machine. It is a computer program that tells them — the machine what to do, so you push a button, start the machine, and you get a [breath test] result of .11. There is a number of mechanical and electrical synapses that occur from point "A" to the end point, and it's — the computer — the source code is the underlying computer technology in language that tells the machine to do what it's supposed to do.

The parties stipulated that the manufacturer of the DataMaster machine at issue in this case would not provide the source code to the State. We have set forth additional details about the November 17 hearing as necessary in the analysis section below.

The county court entered an order on November 29, 2005, ruling further on Kuhl's motion. The court was convinced by the representations made by the State, and not refuted by Kuhl, that the State was not in possession of the items described in paragraph 3 of Kuhl's motion. The court cited Neb. Rev. Stat. § 29-1914 (Reissue 1995) concerning the limitation of orders of discovery to items or information "'within the possession, custody, or control of the state or local subdivisions of government'" and found it unquestionable in the present case that the State was not in possession of "anything other than what it ha[d] already produced." Accordingly, aside from the items already produced by the State, the court denied Kuhl's motion as to all other remaining production sought by his motion.

Trial was held before the county court beginning on January 18, 2006. The evidence shows that on May 12, 2005, at approximately 9:40 p.m., Omaha police officer Michael Joseph Frank was sitting in his cruiser, operating stationary radar, when his attention was drawn to a 1999 Subaru Forester. Frank estimated that the Subaru was traveling at approximately 45 miles per hour in a 30-mile-per-hour zone and confirmed its speed of 44 miles per hour with radar. Frank radioed ahead to Officer Steven J. Garcia, another Omaha police officer, identified the Subaru, and advised Garcia that it was traveling at an excessive rate of speed. Garcia caught up to the Subaru and pulled it over for speeding.

After stopping the Subaru, Garcia administered a number of field sobriety tests to Kuhl, and Kuhl failed to perform some of the tests up to Garcia's expectations. Garcia placed Kuhl under arrest for speeding and suspicion of DUI and transported him to a police station. At the station, Garcia read Kuhl a postarrest chemical test advisement form, and both Garcia and Kuhl signed the form. Garcia observed Kuhl perform a breath test and then cited Kuhl for speeding and DUI.

Officer James Brady, a senior crime laboratory technician with the Omaha Police Department, testified concerning the breath test administered to Kuhl and the maintenance of the DataMaster machine used to test Kuhl's breath. Brady's testimony established that Kuhl's breath was tested by a DataMaster machine located at police headquarters. Brady's testimony covered the specific identity of the actual machine used to test Kuhl's breath, the maintenance of the machine, the holders of various permits to both maintain and conduct tests on the machine in question, and the documentation relating to the maintenance of the machine. Patricia A. Osier, a crime laboratory technician, testified to the administration of the test of Kuhl's breath, which test yielded a result of .100 of a gram of alcohol per 210 liters of breath.

Dr. John Vasiliades testified on behalf of the defense. Vasiliades acknowledged that he has not used the DataMaster machine regularly but has read the manual on the machine and kept up with the literature regarding the machine. Vasiliades testified to the chemical process by which alcohol is ingested

by, absorbed into, and eliminated by a human; random increases and decreases in breath alcohol called "spiking"; the appropriate margin of error that Vasiliades believes should apply; and purported flaws with respect to a DataMaster machine as used for measuring breath alcohol, including various other substances that can be detected by infrared spectrophotometry.

Trial resumed on February 8, 2006, and the county court heard testimony from Kuhl. The county court entered an order on February 17 finding Kuhl guilty of speeding 11 to 15 miles per hour over the posted speed limit. With respect to the DUI charge, the court noted that Nebraska statutes provide two alternative bases, either of which can serve as the basis for convicting an individual of DUI. With regard to the first basis, the operation of the vehicle itself, the court found the evidence adduced by the State insufficient to establish guilt beyond a reasonable doubt. The court noted that while Garcia, who administered certain field sobriety tests, testified that he did so to determine Kuhl's level of intoxication, there was insufficient testimony to establish a relationship between Kuhl's performance on the field sobriety tests and his ability to operate a motor vehicle. With respect to the second basis, the concentration of alcohol in the driver's breath, after considering the evidence adduced by both sides, the court was convinced beyond a reasonable doubt that Kuhl had a concentration of alcohol in his breath in excess of the allowable limits, and accordingly, it found Kuhl guilty of DUI.

A sentencing hearing was conducted before the county court on March 2, 2006. During the sentencing hearing, Kuhl's attorney asked the court about the possibility of the use of "the ignition interlock device for motor code." The court declined Kuhl's request to impose the use of an ignition interlock device.

The county court entered an order imposing sentence on March 2, 2006. The court sentenced Kuhl to probation for a period of 12 months and revoked Kuhl's license for the first 60 days of the probationary period. The court also fined Kuhl $400 and ordered Kuhl to attend and complete a DUI class as well as a victim impact class.

Kuhl appealed his convictions to the district court, and on November 8, 2006, the district court entered an order

affirming the "judgment of conviction and sentence" imposed by the county court. Kuhl subsequently perfected his appeal to this court.

ASSIGNMENTS OF ERROR

Kuhl asserts that the county court erred in (1) not requiring the State to turn over the source code for the DataMaster machine, (2) failing to allow Kuhl to withdraw his previously entered pleas of not guilty, (3) failing to allow Kuhl to call an expert witness at the November 17, 2005, hearing and not allowing two technical documentation exhibits into evidence at that hearing, (4) incorrectly applying a maintenance document marked exhibit 10 at the time of trial, (5) misapplying and misinterpreting the testimony of Vasiliades, (6) not applying Vasiliades' unrebutted testimony regarding the margin of error of .030 grams per 210 liters of breath to the present case, and (7) refusing to allow the use of an ignition interlock device as a condition of probation.

STANDARD OF REVIEW

[1-3] In an appeal of a criminal case from the county court, the district court acts as an intermediate court of appeal, and as such, its review is limited to an examination of the county court record for error or abuse of discretion. *State v. Dittoe*, 269 Neb. 317, 693 N.W.2d 261 (2005). Both the district court and a higher appellate court generally review appeals from the county court for error appearing on the record. *Id.* When reviewing a judgment for errors appearing on the record, an appellate court's inquiry is whether the decision conforms to the law, is supported by competent evidence, and is neither arbitrary, capricious, nor unreasonable. *Id.*

ANALYSIS

Discovery of Source Code.

Kuhl asserts that the county court erred in not requiring the State to turn over the source code for the DataMaster machine. Kuhl argues that the court should have either required the State to turn over the source code or dismissed the case due to the State's inability to turn over the source code; or, alternatively, that the court should have prevented the State from using the results of the breath test.

The district court found that the county court correctly limited discovery to items or information within the possession, custody, or control of the State. The district court also found that the county court correctly determined that the State should not be prevented from using the results of the breath test which were "subject to the source code." The district court found that the State showed that the DataMaster machine was reliable at the time the testing occurred and that the results' use was correctly allowed by the county court.

[4-6] Discovery in a criminal case is generally, and in the absence of a constitutional requirement, controlled by either a statute or court rule. *State v. Kinney*, 262 Neb. 812, 635 N.W.2d 449 (2001). A trial court is vested with broad discretion in considering discovery requests of defense counsel, and error can be predicated only upon an abuse of discretion. *State v. Null*, 247 Neb. 192, 526 N.W.2d 220 (1995). An abuse of discretion occurs when a trial court's decision is based upon reasons that are untenable or unreasonable or if its action is clearly against justice or conscience, reason, and evidence. *State v. Floyd*, 272 Neb. 898, 725 N.W.2d 817 (2007).

Section 29-1914 discusses limitation of discovery orders in criminal cases. Section 29-1914 provides:

> Whenever an order is issued pursuant to the provisions of section 29-1912 or 29-1913, it shall be limited to items or information within the possession, custody, or control of the state or local subdivisions of government, the existence of which is known or by the exercise of due diligence may become known to the prosecution.

[7-9] Kuhl urges this court to balance his Sixth Amendment right of confrontation against the clear requirements of § 29-1914 and against any trade secret right that the manufacturer of the machine in question might have. Kuhl argues that he should be assured the opportunity to examine the evidence against him and that this requires the State to turn over the source code to allow him to, "in a way, cross examine the machine and determine if it was in proper working order." Brief for appellant at 7. Section 29-1914 provides that discovery orders "shall be limited to items or information within the possession, custody, or control" of the State. Statutory interpretation presents a question

of law, for which an appellate court has an obligation to reach an independent conclusion irrespective of the determination made by the court below. *State v. Pathod*, 269 Neb. 155, 690 N.W.2d 784 (2005). Statutory language is to be given its plain and ordinary meaning, and an appellate court will not resort to interpretation to ascertain the meaning of statutory words which are plain, direct, and unambiguous. *Id.* As a general rule, the word "shall" is considered mandatory and is inconsistent with the idea of discretion. *Id.* The record is clear that the source code is not in the State's possession and that the manufacturer of the machine in question considers the source code to be a trade secret and the proprietary information of the company. We find no abuse of discretion in the county court's decision with respect to the discoverability of the source code.

Withdrawal of Pleas.

Kuhl asserts that the county court erred in failing to allow Kuhl to withdraw his previously entered pleas of not guilty in order to attack the ordinance under which he was charged with DUI as creating an unconstitutional presumption. Kuhl references a defendant's right under the Fifth Amendment and then argues:

> However, in a [DUI] case, the Defendant is presumed guilty if [he or she tests] .08 or above on the breathalyzer. Once the results of this test are heard in the courtroom, the Defendant is then required to take some affirmative action to show his/her non-guilt. This rebuttable presumption stands in stark contrast to a right guaranteed to a criminal Defendant.

Brief for appellant at 9.

[10-12] In order to bring a constitutional challenge to the facial validity of a criminal statute, the proper procedure is to file a motion to quash or a demurrer. *State v. Liston*, 271 Neb. 468, 712 N.W.2d 264 (2006). Once a defendant has entered a plea, or a plea is entered for the defendant by the court, the defendant waives all facial constitutional challenges to a statute unless that defendant asks leave of the court to withdraw the plea and thereafter files a motion to quash. *Id.* Prior to sentencing, the withdrawal of a plea forming the basis of a conviction

is addressed to the discretion of the trial court, and its ruling will not be disturbed on appeal absent an abuse of that discretion. *State v. Schneider*, 263 Neb. 318, 640 N.W.2d 8 (2002). See, also, *Goemann v. State*, 94 Neb. 582, 143 N.W. 800 (1913) (holding that refusal to permit defendant charged with gambling to withdraw plea of not guilty to object to variance between information and original complaint and file plea in abatement was not abuse of discretion); *Ingraham v. State*, 82 Neb. 553, 118 N.W. 320 (1908) (request for leave to withdraw plea of not guilty and file plea in abatement is addressed to sound discretion of trial court, and reviewing court will not disturb ruling thereon unless record clearly shows abuse of discretion).

Kuhl did not cite to any authority in support of his argument that the ordinance or statute in question is constitutionally infirm. The district court found that the county court's decision not to allow Kuhl to withdraw his not guilty plea and thereafter attack the constitutionality of the ordinance or its underlying statute was clearly within the discretion of the county court. We agree, and we find no abuse of discretion in the county court's refusal to allow Kuhl's withdrawal of his previously entered pleas of not guilty.

Rulings at November 17, 2005, Hearing.

Kuhl asserts that the county court erred in failing to allow Kuhl to call an expert witness at the November 17, 2005, hearing and not allowing two technical documentation exhibits into evidence at that hearing; however, as noted by the district court, contrary to Kuhl's assertions, those exhibits were received into evidence by the county court at the November 17 hearing.

At the November 17, 2005, hearing, Kuhl sought to present expert testimony as to "the importance of the source code in the proper defense of [Kuhl]." Brief for appellant at 9. The court initially asked Kuhl's attorney for a basic description of the source code. The court then stated, "I don't know that I need your expert to elaborate or provide me with a more technical description of what you've referred to as the source code. If the State doesn't have it, I'm not going to order them [sic] to produce it." After hearing argument from the parties, the court inquired, "Is [Kuhl's expert] going to be able to help me resolve

whether the State has these things or not?" Kuhl's attorney indicated that his expert would not be able to help the court make such a determination, and the court again declined to hear testimony from Kuhl's expert, "because it's not relevant." Kuhl's attorney then asked to make an offer of proof and sought to have his expert testify during the course of the offer of proof. The county court allowed Kuhl to make an offer of proof by "paraphras[ing] what the expert would say," which Kuhl's counsel did. The court also received the two technical documentation exhibits for purposes of Kuhl's offer of proof. Those exhibits are documents concerning the source code and the accuracy of a particular type of breath testing machine.

[13] The district court determined that the county court's refusal to allow Kuhl's expert to testify as to "the science of the source code" during pretrial proceedings was not an abuse of discretion given the county court's determination that the State did not have a legal obligation to produce evidence not in its possession. The admission of expert testimony is ordinarily within the discretion of the trial court, and its ruling will be upheld in the absence of an abuse of discretion. *State v. Duncan*, 265 Neb. 406, 657 N.W.2d 620 (2003). The county court determined that testimony from Kuhl's expert was not relevant to a determination of whether the State should be required to turn over the source code.

[14,15] Evidence is relevant when it has any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence. *State v. Iromuanya*, 272 Neb. 178, 719 N.W.2d 263 (2006), *cert. denied* 549 U.S. 1167, 127 S. Ct. 1129, 166 L. Ed. 2d 893 (2007); Neb. Rev. Stat. § 27-401 (Reissue 1995). The exercise of judicial discretion is implicit in determinations of relevancy under § 27-401 and prejudice under Neb. Rev. Stat. § 27-403 (Reissue 1995), and a trial court's decision under these evidentiary rules will not be reversed absent an abuse of discretion. *State v. Davlin*, 272 Neb. 139, 719 N.W.2d 243 (2006).

The record shows that the testimony of Kuhl's expert was not relevant to the questions before the county court, those being whether the State had access to the source code for the machine

used to test Kuhl's breath and whether the State should be required to turn over the source code. We have already affirmed the district court's upholding of the county court's rulings on the discoverability of the source code. Accordingly, we find no abuse of discretion in the county court's refusal to allow Kuhl's expert to testify further about the source code.

Trial Exhibit 10.

Kuhl asserts that the county court erred in incorrectly applying exhibit 10 at the time of trial. The record does not include a copy of exhibit 10, but it was identified at trial as being a copy of the scheduled maintenance and calibration log for the DataMaster machine at issue from January 21 through March 2, 2005. Brady, a senior crime laboratory technician, testified that exhibit 10 was part of the maintenance and calibration that is necessary to ensure that the DataMaster machine is working properly. Kuhl's counsel questioned Brady extensively about the values shown on exhibit 10 and then offered exhibit 10 into evidence. The State observed that the maintenance checks reflected on exhibit 10 were "[v]alid until [the] 2nd of March, '05," and had an expiration date of May 8, prior to when the test of Kuhl's breath was given. The State then objected as to the relevance of exhibit 10. The court stated that it was not sure whether exhibit 10 showed a problem with the machine, "because neither [the prosecutor nor Kuhl's counsel had] asked the ultimate question of [Brady]," and sustained the objection until the actual relevance was determined. Upon redirect examination, Brady was questioned further about the data shown on exhibit 10. Brady reaffirmed his earlier testimony that on May 12, the DataMaster machine in question was working properly and was in compliance with administrative regulations.

Kuhl argues that exhibit 10 contained evidence that the DataMaster machine was operating outside the acceptable margin of error and asserts that accordingly, the foundation for the test results of Kuhl's breath was not met on the part of the State, making the test of Kuhl's breath inadmissible. The maintenance checks reflected in exhibit 10 were no longer valid as of the date when Kuhl's breath was tested, and a review of Brady's testimony makes it clear that the machine was working properly on

the date in question. Brady testified without objection that the machine was operating properly on May 12, 2005. Additionally, a maintenance and calibration log for April 24 that was valid until June 4 and a report from a 190-day check of the machine performed on April 24 for the period from April 24 to November 14 were both received into evidence without objection. That log and report show that the machine was operating within the target values and acceptable ranges for the breath test simulator solutions tested. We observe that Osier, a crime laboratory technician, testified without objection that the result of Kuhl's breath test was .100 of a gram of alcohol per 210 liters of breath. Further, Kuhl's breath test result document was admitted into evidence without objection. As did the district court, we determine that the county court was not clearly wrong in excluding exhibit 10 from evidence.

Testimony of Vasiliades.

Kuhl asserts that the county court erred in misapplying and misinterpreting the testimony of Vasiliades. Kuhl also asserts that the county court erred in not applying Vasiliades' unrebutted testimony regarding the margin of error of .030 grams per 210 liters of breath to the present case. Kuhl observed that the State did not offer any expert testimony and that most of Vasiliades' testimony was unrebutted. Kuhl argues that although Vasiliades' testimony was the only factual evidence on issues such as the reliability of the DataMaster machine, the court still found Kuhl guilty of DUI. Kuhl argues further that the court did not give Vasiliades' testimony the correct weight and "incorrectly applied his testimony." Brief for appellant at 12.

[16,17] Triers of fact are not required to take opinions of experts as binding upon them. *Jones v. Meyer*, 256 Neb. 947, 594 N.W.2d 610 (1999). In reviewing a criminal conviction, an appellate court does not resolve conflicts in the evidence, pass on the credibility of witnesses, or reweigh the evidence. *State v. Gutierrez*, 272 Neb. 995, 726 N.W.2d 542 (2007). Such matters are for the finder of fact, and a conviction will be affirmed, in the absence of prejudicial error, if the properly admitted evidence, viewed and construed most favorably to the State, is sufficient to support the conviction. *Id.* We decline to reweigh the

testimony of Vasiliades. Concerning Vasiliades' testimony, the district court observed that the county court was the trier of fact and was "permitted to give the weight to [Vasiliades'] testimony that it found appropriate to do." The district court found Kuhl's assignment of error regarding the county court's application and interpretation of Vasiliades' testimony to be without merit. The district court also found Kuhl's assertion that the county court erred in "not applying the unrebutted margin of error of .03 to the test in question" to be without merit. As did the district court, we find no error in the county court's determinations as to the credibility and weight of Vasiliades' testimony.

[18,19] Kuhl notes the lapse in time between when Kuhl was stopped and when the breath test was administered. Kuhl refers to concerns raised in Vasiliades' testimony about whether a defendant's breath alcohol content at the time of testing accurately reflects the content at the time that defendant was driving a motor vehicle. However, Nebraska law provides that matters of delay between driving and testing go to the weight of the breath test results, rather than to the admissibility of the evidence. *State v. Kubik*, 235 Neb. 612, 456 N.W.2d 487 (1990). A valid breath test given within a reasonable time after the accused was stopped is probative of a violation of the DUI statute. *Id.* There is nothing in the record to suggest that Kuhl's breath test was not given within a reasonable time after Kuhl was stopped. Kuhl's assignments of error relating to this issue are without merit.

Use of Ignition Interlock Device.

[20,21] Kuhl asserts that the county court erred in refusing to grant the use of an ignition interlock device as a condition of probation. Neb. Rev. Stat. § 60-6,211.05(1) (Supp. 2003) provides:

> If an order of probation is granted . . . the court may order the defendant to install an ignition interlock device of a type approved by the Director of Motor Vehicles on each motor vehicle operated by the defendant. . . . The device shall, without tampering or the intervention of another person, prevent the defendant from operating the motor vehicle when the defendant has an alcohol concentration greater than the levels prescribed in section 60-6,196.

At the sentencing hearing, the court responded as follows to the request of Kuhl's attorney to consider the use of an interlock device:

> With all d[ue] respect, I have not in my career yet, allowed anyone ignition interlock. I do not intend to. One of the most consequential penalties that I can impose is the loss of driving privileges. And that's — That's the one that I think is going to affect everybody. People with a fat wallet can always pay a $400 fine, so I've never looked at a fine in a DUI case as necessarily a severe penalty. But not being able to drive, if that doesn't get it through to people that they shouldn't drink and drive, I don't know what will. So I — That's a meaningful penalty, and I have not yet imposed the ignition interlock, nor do I intend to in the — until I retire, so [the] request is denied.

When a court sentences a defendant to probation, it may impose any conditions of probation that are authorized by statute. *State v. Lobato*, 259 Neb. 579, 611 N.W.2d 101 (2000). The sentencing court may impose such reasonable conditions of probation as it deems necessary or likely to ensure that the offender will lead a law-abiding life. *Id.*

Kuhl argues that the loss of driving privileges, a fine, and the "great expense of hiring an attorney to fight this matter" have been a great enough penalty. Brief for appellant at 13. Clearly the county court disagreed and did not find the use of an ignition interlock device to be a condition necessary or likely to ensure that Kuhl would lead a law-abiding life. As did the district court, we find nothing in the record to suggest that the county court abused its discretion in rejecting the use of this device.

CONCLUSION

The county court did not abuse its discretion in not requiring the State to turn over the source code, refusing to allow Kuhl to withdraw his not guilty pleas, not allowing Kuhl to call an expert witness at the November 17, 2005, hearing, or rejecting the use of an ignition interlock device. Contrary to Kuhl's assertions, the two technical documentation exhibits he claims were excluded were received into evidence by the county court

at the November 17 hearing. The county court did not err in excluding exhibit 10 from evidence at trial or in its interpretation and application of Vasiliades' testimony.

The county court's decisions conform to the law, are supported by competent evidence, and are neither arbitrary, capricious, nor unreasonable. The district court did not err in affirming Kuhl's "judgment of conviction and sentence."

AFFIRMED.

TIMOTHY T., APPELLEE, V. SHIREEN T., APPELLANT.

741 N.W.2d 452

Filed November 6, 2007. No. A-07-106.

1. **Parental Rights: Evidence: Proof: Words and Phrases.** In cases of termination of parental rights under Neb. Rev. Stat. § 42-364(7) (Cum. Supp. 2006), the standard of proof must be by clear and convincing evidence. Clear and convincing evidence is that amount of evidence which produces in the trier of fact a firm belief or conviction about the existence of a fact to be proved.
2. **Parental Rights: Appeal and Error.** In reviewing a termination of parental rights case held in district court, an appellate court reviews the record de novo to determine whether the district court abused its discretion.
3. **Parental Rights.** Although termination of parental rights cannot be based solely on the fact that a parent has been incarcerated, courts may consider the attendant circumstances which are occasioned by incarceration, and when the aggregate of the circumstances indicates clearly and convincingly that the children's best interests dictate termination of parental rights, such is proper.
4. **Parental Rights: Appeal and Error.** With regard to cases involving termination of parental rights, when a parent whose parental rights are at issue has been incarcerated, an appellate court will consider the nature of the crime committed, as well as the person against whom the criminal act was perpetrated.
5. **Parental Rights: Abandonment: Intent: Words and Phrases.** Parental abandonment has been described as a parent's intentionally withholding from a child, without just cause or excuse, the parent's presence, care, love, protection, maintenance, and opportunity for the display of parental affection for the child.
6. **Abandonment: Intent.** The question of abandonment is largely one of intent, to be determined in each case from all of the facts and circumstances.
7. **Modification of Decree.** In a domestic relations case, if a material change in circumstances has occurred, a former decree may be modified in light of those circumstances.

Appeal from the District Court for Hamilton County: MICHAEL OWENS, Judge. Affirmed.

Kevin V. Schlender for appellant.

Scott D. Grafton, of Svehla, Thomas, Rauert & Grafton, P.C., for appellee.

Rachel A. Daugherty, of Lauritsen, Brownell, Brostrom, Stehlik, Myers & Daugherty, P.C., L.L.O., guardian ad litem.

SIEVERS, CARLSON, and CASSEL, Judges.

CARLSON, Judge.

INTRODUCTION

Shireen T. appeals from an order of the district court for Hamilton County terminating her parental rights to Sharisa T. in an action to modify a decree of dissolution. On appeal, Shireen argues the court erred in finding that there was sufficient evidence to establish she intentionally abandoned or neglected Sharisa and that it is in Sharisa's best interests to terminate her parental rights to Sharisa. Shireen also contends that no material change in circumstances exists to justify a modification of the decree of dissolution. For the reasons set forth below, we affirm.

BACKGROUND

Timothy T. and Shireen's marriage was dissolved by a decree of dissolution entered by the district court on September 27, 1999. The court awarded Shireen custody of the parties' three minor children—a son, born October 22, 1986; another son, born December 28, 1989; and Sharisa, born May 2, 1998—subject to visitation for Timothy. On December 25, 1999, Shireen was arrested for conspiring to murder Timothy. In February 2000, the court entered a temporary order granting Timothy custody of the children, with visitation rights for Shireen.

In August 2001, the court convicted Shireen of conspiring to murder Timothy, and in September, the court sentenced Shireen to 8 to 15 years in prison. Shireen appealed to the Nebraska Supreme Court, which affirmed Shireen's conviction and sentence. See *State v. Tyma*, 264 Neb. 712, 651 N.W.2d 582 (2002). The record shows that if Shireen does not lose any good time, her release date is February 8, 2009.

On October 24, 2001, the court modified the decree and granted Timothy legal custody of the children; pursuant to the parties' stipulation, the boys were placed with Shireen's parents and Sharisa was placed with Timothy. The parties also stipulated that Shireen would not have visitation with Sharisa.

On March 6, 2006, Timothy filed a complaint to terminate Shireen's parental rights. Hearings were held on September 12 and 20 and October 11. Lisa Pattison, a clinical psychologist, testified on Timothy's behalf. Pattison testified that in 2004, she observed Sharisa, Timothy, and Pam T., Timothy's wife, together on two occasions. Pattison testified that Sharisa has developed secure attachments to Timothy. Pattison also testified that Sharisa calls Pam "mommy" and is securely attached to Pam. Pattison testified that Sharisa has not had contact with Shireen since May or June 2001 and that this lack of contact has detrimentally impacted Sharisa's relationship with Shireen. Pattison testified that Sharisa has no real memory of Shireen.

Pattison testified that she interviewed Shireen and that Shireen denied the conspiracy charges against her and did not indicate any remorse. Pattison testified that it is in Sharisa's best interests to reside with Pam and Timothy on a permanent basis. Pattison testified that she would be concerned if Shireen had visitation with Sharisa once Shireen is released from prison, because Shireen lacks insight regarding how her conviction and incarceration have negatively impacted Sharisa.

Pattison testified that she was also concerned given Shireen's history of emotional instability and "homicidal, suicidal thoughts." Pattison testified that Shireen had been suicidal on two prior occasions and had previously been diagnosed with major depression and bipolar disorder.

Pattison testified that she was concerned that Shireen would not seek treatment after her release from prison and would have a mental breakdown. Pattison also testified that Shireen has a past history of turning the children against Timothy.

Timothy testified that he married Pam on November 28, 2003. Timothy testified that Sharisa has resided with Timothy and Pam consistently since January 2000. Timothy testified that after he was awarded custody, Shireen had visitation with Sharisa, but that in May or June 2001, he stopped Sharisa's

visits with Shireen. Timothy testified that he did so because Sharisa came home after a visit with Shireen and said that Shireen was taking pictures of Sharisa while Sharisa was naked. Timothy testified that Sharisa had not seen Shireen since then. Timothy testified that he and Sharisa are "as close as a father [and] daughter can be."

Timothy testified that since Shireen became incarcerated, she has never provided any financial support for Sharisa, and that since June 2001, Sharisa had received three cards from Shireen. Timothy testified that Shireen had never called Sharisa, nor provided any emotional support for Sharisa in the previous 5 years. Timothy testified that in October 2001, Shireen voluntarily agreed to not have visitation with Sharisa. Timothy testified that if Shireen's parental rights were terminated, Pam would adopt Sharisa.

Timothy testified that Sharisa had not seen her brothers since Thanksgiving 2001. Timothy testified that he has no contact with his sons, because they blame him for Shireen's incarceration. Timothy testified that Shireen's parents have not promoted his relationship with his sons. Timothy testified that it is in Sharisa's best interests to be adopted by Pam.

The trial judge also spoke to Sharisa in chambers. Sharisa stated that she knows very little about Shireen, whom she termed her "birth mom." Sharisa stated that the court proceedings were "to get [her] birth mom's rights taken away." Sharisa stated that she wanted Pam to adopt her, but did not know why. When Sharisa was asked whether she had ever wanted to see Shireen, Sharisa stated, "Not really. . . . I haven't really been thinking about her."

Shireen testified that before her visitation with Sharisa was stopped, Shireen was very close to Sharisa and had a strong bond with her. Shireen testified that during the time she had visitation with Sharisa, Shireen began to have concerns regarding Timothy's care of Sharisa. Shireen testified that she noticed bruises on Sharisa's body, Sharisa appeared dirty and thin, and she was hungry.

Shireen testified that because of Sharisa's condition, she took Sharisa to an emergency room and the police were contacted, in addition to social services. Shireen testified that nothing ever

came from any of the subsequent investigations. Shireen testified that Timothy stopped her visits with Sharisa in May 2001, because Shireen had taken pictures of the bruises on Sharisa's body. Shireen testified that prior to this time, she exercised her visitation with Sharisa consistently.

Shireen testified that she did not agree to give up her visitation rights with Sharisa in October 2001. Shireen testified that when she became aware of the order stating that she would no longer have visits with Sharisa, Shireen contacted her attorney on multiple occasions, asking him to "correct the mistake." Shireen testified that she also contacted the court directly. Shireen testified that she did not appeal the order, because she did not know she could. Shireen testified that she continued to seek visitation with Sharisa, contacting several attorneys by telephone and writing approximately 20 letters to different people and organizations. Shireen testified that she also filed a cross-petition for visitation when Timothy filed to terminate her parental rights. Shireen testified that her cross-petition was stricken by the court.

Shireen testified that she sent Sharisa cards from 2001 until February 2004 for "Valentine's Day and Christmas and birthdays." Shireen testified that she also tried to call Sharisa, but that Timothy's telephone did not accept her collect calls. Shireen testified that she stopped sending Sharisa cards, because she did not know whether Sharisa was receiving them.

Shireen testified that while in prison, she took several classes, including classes on criminal behavior, domestic violence, stress and anxiety, and cognitive thinking skills, in addition to three classes on building positive relationships and a parenting class.

Shireen testified that she never intended to abandon or neglect Sharisa. Shireen testified that at the time of the divorce, she experienced depression and was treated for it. Shireen stated that she did not attempt suicide. Shireen testified that she is no longer depressed and is not on any medications.

Carol Denton, a licensed mental health practitioner, testified that she counseled Shireen for depression and anxiety from 1999 to 2001. Denton testified that during that time, she observed Shireen with Sharisa, and Denton described Shireen as

very nurturing and loving toward Sharisa. Denton testified that Sharisa appeared bonded and attached to Shireen.

Denton testified that because Sharisa's contact with Shireen "ended abruptly" when Shireen became incarcerated, Sharisa was adversely affected. Specifically, Denton testified that because Sharisa was so young when her contact with Shireen ended, Sharisa may be prone to develop extreme rage, crying, and depression, and that depression could remain an issue throughout Sharisa's life. Denton testified that typically, a child who is separated from a parent at a young age faces difficulties with each new stage of development.

Denton testified that even if the child subsequently forms a new bond with a competent caregiver, that bond is less secure than the child's relationship with his or her parent. Denton testified that a child could be provided permanency without an adoption and that excluding a person a child is attached to is psychologically damaging to the child. Denton testified that it would not damage Sharisa psychologically to begin visitation with Shireen again. Denton testified that all children separated from a primary caregiver will experience rage and depression at some point in their lives. On redirect examination, Timothy testified that he had never seen Sharisa in a rage.

In an order filed December 28, 2006, the district court modified the decree of dissolution and terminated Shireen's parental rights to Sharisa. Specifically, the trial court stated that having considered the nature of Shireen's crime, the fact that the victim of the crime was Sharisa's father, and the fact that Shireen is incarcerated, which prevents her from parenting Sharisa in an appropriate fashion, there is clear and convincing evidence to conclude that Shireen either abandoned or neglected Sharisa in a manner as to require termination of her parental rights. The trial court also found that termination of Shireen's parental rights is in Sharisa's best interests. Shireen appeals.

ASSIGNMENTS OF ERROR

On appeal, Shireen contends that the district court erred in finding (1) that there was clear and convincing evidence to establish that she intentionally abandoned or neglected Sharisa; (2) that it is in Sharisa's best interests to terminate Shireen's

parental rights; and (3) that there was a material change in circumstances sufficient to justify a modification of the decree of dissolution, terminating her parental rights.

ANALYSIS

Termination.

On appeal, Shireen contends that the district court erred in finding that there was clear and convincing evidence to establish that she intentionally abandoned or neglected Sharisa. Neb. Rev. Stat. § 42-364(7) (Cum. Supp. 2006) concerns termination of parental rights in a dissolution action and states in part:

> The court may terminate the parental rights of one or both parents after notice and hearing when the court finds such action to be in the best interests of the minor child and it appears by the evidence that one or more of the following conditions exist: (a) The minor child has been abandoned by one or both parents; (b) One parent has or both parents have substantially and continuously or repeatedly neglected the minor child and refused to give such minor child necessary parental care and protection.

[1,2] In cases of termination of parental rights under § 42-364(7), the standard of proof must be by clear and convincing evidence. Clear and convincing evidence is that amount of evidence which produces in the trier of fact a firm belief or conviction about the existence of a fact to be proved. *Joyce S. v. Frank S.*, 6 Neb. App. 23, 571 N.W.2d 801 (1997), *disapproved on other grounds, Betz v. Betz*, 254 Neb. 341, 575 N.W.2d 406 (1998). In reviewing a termination of parental rights case held in district court, an appellate court reviews the record de novo to determine whether the district court abused its discretion. *Worm v. Worm*, 6 Neb. App. 241, 573 N.W.2d 148 (1997).

In the instant case, the trial court stated that having considered the nature of the crime, the fact that the victim of Shireen's crime was Sharisa's father, and the fact that Shireen's incarceration prevents her from parenting Sharisa in an appropriate fashion, there is clear and convincing evidence to conclude that Shireen either abandoned or severely neglected Sharisa in a manner as to require termination of her parental rights.

[3] Although termination of parental rights cannot be based solely on the fact that a parent has been incarcerated, courts may consider the attendant circumstances which are occasioned by incarceration, and when the aggregate of the circumstances indicates clearly and convincingly that the children's best interests dictate termination of parental rights, such is proper. *In re Interest of Brettany M. et al.*, 11 Neb. App. 104, 644 N.W.2d 574 (2002).

[4] With regard to cases involving termination of parental rights, Nebraska appellate courts have declared that when a parent whose parental rights are at issue has been incarcerated, we consider the nature of the crime committed, as well as the person against whom the criminal act was perpetrated. *Conn v. Conn*, 15 Neb. App. 77, 722 N.W.2d 507 (2006).

In *Conn v. Conn*, a father, Bobby Conn, conspired to murder his wife, Alicia Conn, in front of the couple's young child. After Bobby was convicted, he moved for visitation with the child, which Alicia opposed. The trial court denied Bobby visitation. After reviewing the evidence, this court affirmed the trial court's decision, stating, "While it is natural to focus on Alicia as the object of Bobby's crime, the subject child was also a victim of Bobby's scheme. Had Bobby's conspiracy achieved its end, the child would have been forever deprived of her mother." *Id.* at 84, 722 N.W.2d at 513.

Similarly, in the instant case, had Shireen's conspiracy to murder Timothy been successful, Sharisa would have been forever deprived of Timothy's love and affection. The record shows that Shireen became incarcerated in 2001, when Sharisa was approximately 3 years old, and that Shireen is not likely to be released from prison until 2009, when Sharisa is 11 years old.

Shireen has not seen Sharisa since the middle of 2001, and in the October 2001 modification granting Timothy custody of Sharisa, the parties' stipulated that Shireen would not have visitation with Sharisa. Since 2001, Shireen's contact with Sharisa has been limited to three birthday cards sent by Shireen to Sharisa.

Although Shireen claims that she never intended to abandon Sharisa, in *In re Interest of B.A.G.*, 235 Neb. 730, 735, 457 N.W.2d 292, 297 (1990), the Nebraska Supreme Court noted

that the father's actions which resulted in incarceration were "every bit as voluntary as if he had purchased a ticket for a 6-, 7-, or 8-year trek into Siberia" and that the father had just as effectively placed himself in a position where he could not possibly offer his presence, care, love, protection, maintenance, and opportunity for displaying parental affection.

[5,6] Parental abandonment has been described as a parent's intentionally withholding from a child, without just cause or excuse, the parent's presence, care, love, protection, maintenance, and opportunity for the display of parental affection for the child. *In re Interest of Dezziny C.*, 15 Neb. App. 179, 723 N.W.2d 652 (2006). The question of abandonment is largely one of intent, to be determined in each case from all of the facts and circumstances. *In re Interest of Theodore W.*, 4 Neb. App. 428, 545 N.W.2d 119 (1996).

In the instant case, Shireen's incarceration has similarly made it nearly impossible for her to provide for any of Sharisa's needs for at least 8 years of Sharisa's life. By conspiring to murder Timothy, Shireen has effectively placed herself in a position where she cannot possibly offer her presence, care, love, protection, maintenance, and opportunity for displaying parental affection. See *In re Interest of Brettany M. et al.*, 11 Neb. App. 104, 644 N.W.2d 574 (2002). Furthermore, the record shows that Shireen continues to deny the conspiracy charges against her and does not indicate any remorse. Shireen has claimed that she was "setup" by Timothy, and there is evidence that Shireen blames Timothy for the fact that she is in prison.

Shireen cannot now complain that she did not have the opportunities to provide for Sharisa because of her incarceration, when it was her own conduct that placed her in that position. For these reasons, we conclude that the evidence clearly and convincingly established that Shireen either abandoned Sharisa or substantially and continuously or repeatedly neglected and refused to give Sharisa necessary parental care and protection, justifying the termination of Shireen's parental rights.

Best Interests.

Shireen argues that the trial court erred in finding that termination of her parental rights is in Sharisa's best interests.

Pattison testified that Sharisa has developed secure attachments to Timothy and Pam. Pattison also testified that Sharisa calls Pam "mommy." Pattison testified that Sharisa has not had contact with Shireen since May or June 2001 and that this lack of contact has detrimentally impacted Sharisa's relationship with Shireen. Pattison testified that Sharisa has no real memory of Shireen.

Pattison testified that it is in Sharisa's best interests to reside with Pam and Timothy on a permanent basis. Pattison testified that she would be concerned if Shireen had visitation with Sharisa, because Shireen has no insight into how her conviction and resulting incarceration have negatively impacted Sharisa.

Pattison testified that she was also concerned given Shireen's history of emotional instability and "homicidal, suicidal thoughts." Pattison testified that Shireen had been suicidal on two prior occasions and had previously been diagnosed with major depression and bipolar disorder.

Pattison testified that she was concerned that Shireen would not seek treatment after her release from prison and would have a mental breakdown. Pattison also testified that Shireen has a past history of turning the children against Timothy.

The trial judge also spoke to Sharisa in chambers. Sharisa stated that she knows very little about Shireen, whom she termed her "birth mom." Sharisa stated that the court proceedings were "to get [her] birth mom's rights taken away." Sharisa stated that she wanted Pam to adopt her. When Sharisa was asked whether she had ever wanted to see Shireen, Sharisa stated, "Not really. . . . I haven't really been thinking about her."

Given this evidence, we cannot say that the trial court abused it discretion in finding that termination of Shireen's parental rights is in Sharisa's best interests.

Material Change in Circumstances.

[7] Shireen also argues that no material change of circumstances exists sufficient to justify the modification of the dissolution decree. Shireen contends that at the time of the October 24, 2001, modification, the parties were well aware of Shireen's conviction and sentence and Timothy failed to present the court with evidence which the court had been unaware of in October

2001. If, in a domestic relations case, a material change in circumstances has occurred, a former decree may be modified in light of those circumstances. *Worm v. Worm*, 6 Neb. App. 241, 573 N.W.2d 148 (1997).

At the time of the last modification, Shireen was incarcerated and was not seeking any visitation with Sharisa. Shireen is now seeking to have visits with Sharisa. As previously stated, Shireen continues to claim that she did not conspire to murder Timothy, the crime of which she was convicted. Shireen's continued denial clearly hinders the reestablishment of a relationship between Shireen and Sharisa. Additionally, Sharisa testified that she is not really interested in seeing Shireen after several years apart, and the evidence shows that Sharisa has developed a secure attachment to Pam over the last several years. These changes are material and could not have been anticipated in October 2001, when the trial court previously modified the decree. See *Joyce S. v. Frank S.*, 6 Neb. App. 23, 571 N.W.2d 801 (1997), *disapproved on other grounds, Betz v. Betz*, 254 Neb. 341, 575 N.W.2d 406 (1998). Therefore, there have been several material changes since the prior modification sufficient to allow the court to modify the decree again.

CONCLUSION

After reviewing the record, we conclude the district court did not err in finding that there was clear and convincing evidence to establish Shireen intentionally abandoned or neglected Sharisa; that it is in Sharisa's best interests to terminate Shireen's parental rights; and that there was a material change in circumstances sufficient to justify a modification of the decree of dissolution, terminating Shireen's parental rights. The trial court's order is affirmed in all respects.

AFFIRMED.

Douglas Bailey and Lee Ann Bailey, appellants, v. First National Bank of Chadron, appellee.

741 N.W.2d 184

Filed November 13, 2007. No. A-06-060.

1. **Pleadings.** A trial court's denial of leave to amend pleadings is appropriate only in those limited circumstances in which undue delay, bad faith on the part of the moving party, futility of the amendment, or unfair prejudice to the nonmoving party can be demonstrated.
2. **Pleadings: Appeal and Error.** An appellate court generally reviews the denial of a motion to amend for an abuse of discretion.
3. ____: ____. An appellate court reviews de novo the underlying legal conclusion of whether the proposed amendments to a complaint would have been futile.
4. ____: ____. With regard to Neb. Ct. R. of Pldg. in Civ. Actions 15(a) (rev. 2003), an abuse of discretion may be found if the court simply denies the motion to amend without offering any explanation. On the other hand, when the reasons for the denial are readily apparent, the failure to include reasons is not a per se abuse of discretion, although the better practice is to state the reasons.
5. **Judgments: Records: Appeal and Error.** Meaningful appellate review requires a record that elucidates the factors contributing to the lower court judge's decision.
6. **Pleadings: Time.** Delay alone is not a reason in and of itself to deny leave to amend a pleading; the delay must have resulted in unfair prejudice to the party opposing amendment.
7. **Pleadings: Proof.** The burden of proof of prejudice is on the party opposing amendment of a pleading.
8. **Pleadings: Evidence: Summary Judgment.** If leave to amend a pleading is sought under Neb. Ct. R. of Pldg. in Civ. Actions 15(a) (rev. 2003) before discovery is complete and before a motion for summary judgment has been filed, the question of whether such amendment would be futile is judged by reference to Neb. Ct. R. of Pldg. in Civ. Actions 12(b)(6) (rev. 2003). Leave to amend in such circumstances should be denied as futile only if the proposed amendment cannot withstand a rule 12(b)(6) motion to dismiss. If, however, the rule 15(a) motion is made in response to a motion for summary judgment and the parties have presented all relevant evidence in support of their positions, then the amendment should be denied as futile only when the evidence in support of the proposed amendment creates no triable issue of fact and the opposing party would be entitled to judgment as a matter of law.
9. **Appeal and Error.** An appellate court is not obligated to engage in an analysis which is not needed to adjudicate the controversy before it.

Appeal from the District Court for Dawes County: Paul D. Empson, Judge. Reversed and remanded for further proceedings.

John F. Simmons, of Simmons Olsen Law Firm, P.C., for appellants.

Michael V. Smith, of Smith, King & Freudenberg, P.C., for appellee.

INBODY, Chief Judge, and CARLSON and MOORE, Judges.

MOORE, Judge.

I. INTRODUCTION

Douglas Bailey and Lee Ann Bailey filed a complaint against First National Bank of Chadron (FNBC) in the district court for Dawes County, alleging that FNBC was required to release them from their guaranties of certain loans and that FNBC wrongfully set off $57,726.17 out of a certificate of deposit to pay debts guaranteed by the Baileys. The Baileys further alleged that FNBC instructed the buyer of certain assets of Bailey Tire and Service, Inc. (Bailey Tire), a company owned by the Baileys, to convert $27,179.06 of Bailey Tire assets not included in the sale. The Baileys sought judgment against FNBC for $84,905.23. FNBC filed a motion for summary judgment. The Baileys filed a motion seeking to amend their complaint and also filed a motion for partial summary judgment. The district court denied the motion to amend and entered summary judgment in favor of FNBC. The Baileys have appealed. Because we find that the district court abused its discretion in denying the Baileys' motion to amend the complaint, we reverse, and remand for further proceedings.

II. BACKGROUND

1. ORIGINAL COMPLAINT FILED

The Baileys filed a complaint against FNBC in the district court on June 21, 2005. The Baileys alleged that they were stockholders in Bailey Tire and that FNBC at various times had loaned money to Bailey Tire, which loans were guaranteed by the Baileys in their individual capacities.

The Baileys alleged that on or about February 1, 2002, the parties executed a document entitled "'Amendment to Loan Agreement,'" but they did not specify any further details about the original loan documents in their complaint. The Baileys

alleged that pursuant to their obligations under the amendment to the loan agreement, the Baileys executed a written instrument guaranteeing a $350,000 loan to an entity called I.M.S.H., Inc. (IMSH), which money was loaned to IMSH by FNBC to facilitate the purchase of certain assets of Bailey Tire by IMSH.

The Baileys further alleged that the parties' February 2002 amendment document was itself amended by a letter agreement dated April 3, 2002, that the Small Business Administration (SBA) agreed to guarantee the loans described in the April 2002 letter, and that according to the parties' amendment document, the Baileys' guaranty obligations were therefore terminated.

The Baileys alleged that despite the parties' agreements, on February 21, 2003, FNBC set off, on a certificate of deposit owned by the Baileys, the sum of $57,726.17 to pay the debts of third parties guaranteed by the Baileys. The Baileys alleged that FNBC controlled the transaction between Bailey Tire and IMSH; that at the direction of FNBC, IMSH took $27,179.06 in inventory from Bailey Tire not included in the sale; and that absent the wrongful act of FNBC in converting this inventory, the sum of $27,179.06 would have been available to the Baileys to reduce their obligations to FNBC under their guaranty. The Baileys sought judgment in the amount of $84,905.23.

2. Documents Attached to Original Complaint

The Baileys attached copies of the following documents to their original complaint:

(a) February 2002 Amendment to Loan Agreement

On February 1, 2002, the Baileys, Bailey Tire, and FNBC entered into an agreement amending a September 27, 2001, loan agreement. The amendment document described certain notes referenced in the original loan agreement and the balance due on one of those notes. In the amendment document, the parties agreed that certain assets of the Baileys and Bailey Tire would be sold to IMSH, an entity to be formed by Phillip Darley and Jerry Yanke, and that the proceeds of the sale would be applied to one of the notes referenced in the original loan agreement. The Baileys specifically acknowledged that the

financial status of Bailey Tire had deteriorated substantially since the date of the September 2001 loan agreement.

The February 2002 amendment to the loan agreement contained provisions regarding equity support for the sale of Bailey Tire to IMSH, as follows:

> The [Baileys and Bailey Tire acknowledge] that IMSH will require equity support to complete its purchase from [Bailey Tire]. [The] Baileys agree to furnish up to One Hundred Thousand Dollars ($100,000.00) to IMSH or its shareholders in a manner that will constitute equity for IMSH's loan.
>
> To assist [the] Baileys in providing equity support, [FNBC] will loan [the] Baileys up to $35,000.00 for such purpose which shall be secured by real estate owned by [the] Baileys and which [the] Baileys will lease to IMSH. This loan obligation will be payable in full on or before March 1, 2002.
>
> Further, [FNBC] will agree to loan [the] Baileys an additional $65,000.00 for such purpose providing an SBA loan guarantee is obtained by IMSH. If an SBA loan guarantee is obtained, [FNBC] will combine the existing loan of $35,000.00 with an additional loan of $65,000.00 for a total of $100,000.00. Such loan shall be secured by real estate owned by [the] Baileys and which [the] Baileys will lease to IMSH. The loan of $100,000.00 will be payable in sixty equal monthly payments along with accrued interest. [The] Baileys will service such loan from lease payments received from IMSH. If an SBA guarantee is not obtained, then renewal of the $35,000.00 note shall be at the sole discretion of [FNBC].

In the February 2002 amendment agreement, the Baileys also agreed to guarantee a $350,000 loan from FNBC to IMSH, which IMSH would in turn use to pay Bailey Tire. The 2002 agreement specifically provided:

> The Baileys hereby guarantee the repayment of the $350,000.00 loan made by [FNBC] to IMSH as described in separate guarantees to be executed by the Baileys. Said guarantees will be collateralized with real estate that presently collateralizes their guarantee to the bank. The

> $350,000.00 loan will be evidenced by a promissory note payable in full on or before March 1, 2002. If an SBA guarantee is obtained, [FNBC] will release [the] Baileys from their guarantee obligation of this loan. If an SBA guarantee is not obtained, then renewal of the $350,000.00 loan will be at the sole discretion of [FNBC].

The 2002 amendment agreement also contained the following clause:

> [The Baileys and Bailey Tire acknowledge] that [FNBC] is accommodating [the Baileys and Bailey Tire] in an effort to assist in sale of assets and liquidation to meet [their] obligation with [FNBC]. [The Baileys and Bailey Tire], in consideration of this agreement, along with other accommodations provided to [the Baileys and Bailey Tire] by [FNBC], [agree] to hold [FNBC] harmless from and assert no claim or past or present claims, or course of action adopted by the parties hereinbefore or hereinafter, and which claims the [Baileys and Bailey Tire] may assert against [FNBC] whatsoever. [The Baileys and Bailey Tire] hereby [release FNBC] from all claims, causes of action, demands and liabilities of any kind whatsoever, whether direct or indirect, fixed or contingent, liquidated or non-liquidated, disputed or undisputed, known or unknown, which [the Baileys and Bailey Tire have] or may have or may claim relating in any way to any event, indebtedness, [FNBC-Baileys and Bailey Tire] relationship, circumstance, action or failure to act.

(b) April 2002 Supplementary Letter Agreement

Also attached to the original complaint was a letter from the president of FNBC to the Baileys, dated April 3, 2002. The April 2002 letter provided as follows:

> This is in regard to the loan agreement of September 27, 2001 and an addendum to the agreement of February 1, 2002.
>
> As you are aware, IMSH was unable to obtain an SBA [loan] as planned. However, IMSH has received a conditional commitment for a $150,000 SBA low doc loan on the Scottsbluff location [of Bailey Tire]. The

> remaining un-guaranteed (by SBA) debt of $200,000 will be on the Chadron, Alliance and Fort Morgan locations [of Bailey Tire]. . . . Darley plans to purchase the assets of these locations from IMSH for $200,000. An interim loan may be made to [Darley] and Ms. Darley maturing May 1, 2002. [Darley] will need to secure long term financing. We will require that IMSH, [Yanke] and the both of you guaranty repayment of the $200,000. The renewal of this loan will be at the sole discretion of the bank.
>
> You will be released from your prior $350,000 guaranty once all documentation is in place for the $150,000 SBA low doc loan to IMSH. A formal lease agreement must be received on the Scottsbluff location. Your $200,000 guaranty will remain in full force.
>
> If these terms are agreeable to you, we will initiate item #2 (Purchase Equity Support) of the addendum to the agreement, and extend the maturity of note #2 of the original loan agreement to July 1, 2002 in accordance to the liqui[d]ation plan submitted to the bank on February 15, 2002 and February 26, 2002. Please keep in mind that the agreement and addendum remain in full force. All modifications to these agreements must be in writing.

The Baileys individually, and Douglas Bailey as president of Bailey Tire, signed at the bottom of the letter agreement, indicating their acknowledgment of and agreement to the terms of the letter agreement.

3. FNBC's Answer

FNBC answered on July 18, 2005. FNBC admitted that FNBC had loaned money to Bailey Tire, which loans were individually guaranteed by the Baileys. FNBC also admitted signing the amendment document and the letter agreement of April 3, 2002, but it generally denied the remaining allegations of the complaint.

FNBC affirmatively alleged that it held a first lien on Arizona real estate owned by the Baileys as security for their indebtedness, that the Baileys sold that real estate and used $100,000 of the proceeds for a certificate of deposit, and that the Baileys pledged the certificate of deposit as a substitution of collateral

to FNBC on April 19, 2002, as consideration for financial accommodation given by FNBC to Bailey Tire and others, collateralizing guaranties given by the Baileys to FNBC.

FNBC alleged that it made the $350,000 loan to IMSH at the Baileys' request to accommodate IMSH in the purchase of assets owned by Bailey Tire, which loan was guaranteed by the Baileys. FNBC further alleged that after IMSH failed to pay off the loan guaranteed by the Baileys, FNBC set off $57,726.17 against a certificate of deposit owned by the Baileys to pay debt owed to FNBC by IMSH.

FNBC alleged that in consideration of the accommodation made by FNBC to the Baileys and Bailey Tire, the Baileys released FNBC from all claims against FNBC relating to the guarantees made by the Baileys. FNBC specifically alleged that the Baileys released FNBC from any claims that might be available to the Baileys with respect to the setoff of the Baileys' funds in FNBC's bank.

FNBC asked that the Baileys' complaint be dismissed by the district court.

4. FNBC Files Motion for Summary Judgment

On November 7, 2005, FNBC filed a motion for summary judgment, seeking dismissal of the Baileys' complaint and alleging that the pleadings and admissions on file, including the exhibits attached to the pleadings, showed that there was no genuine issue as to any material fact and that FNBC was entitled to judgment as a matter of law.

5. Baileys File Motion to Amend Complaint

On November 14, 2005, the Baileys filed a motion for leave to amend their complaint. The Baileys attached an amended complaint draft to their motion. In the proposed amended complaint, the Baileys attempted to include claims for mutual mistake and fraudulent misrepresentation, as well as conversion, in addition to what they alleged previously.

In one paragraph of the proposed amended complaint, the Baileys stated:

> [The Baileys] allege that at the time of the execution of [the February 2002 amendment document] and [April

> 2002 letter agreement,] they relied in good faith on the representations of [FNBC], which held itself out to be knowledgeable in such matters, that [an SBA] guarantee was possible. In fact SBA regulations and operating procedures forbade the approval of the loan the parties contemplated. [FNBC's] representation that an SBA guarantee was possible was untrue, was made with the intention that the [Baileys] act upon the representation, was recklessly or negligently made, and was a mistake "as to a basic assumption on which the contract was made," and "ha[d] a material effect on the agreed exchange of performances," within the meaning of Restatement of the Law of Contracts 2d, §§ 152-154. [The Baileys] allege further that [FNBC], as a national bank, held itself out as an expert in financial matters and if it was not aware that SBA regulations forbade the loan guarantee, it should have been aware of that fact. [The Baileys] therefore allege that [FNBC] bears the risk of the mistake. . . . [The Baileys] would never have executed the contracts of February 1, 200[2] and April 3, 2002 had they been aware that an SBA guarantee was not possible. In view of [FNBC's] misrepresentation regarding whether an SBA guarantee was possible, [the Baileys] are entitled to and do hereby avoid the contract of February 1, 2002 as amended by the letter agreement of April 3,[ ]2002. [The Baileys] show that they were induced to execute these contracts as a result of [FNBC's] negligent or reckless representations and that they have suffered damages as a result of those representations.

The Baileys alleged that they paid IMSH and its stockholders $100,000 pursuant to the February 2002 amendment document and that they would not have done so had it not been for the contract formed by that document, which they alleged had been made on FNBC's assurance that an SBA loan guarantee was possible. Further, with respect to FNBC's setoff of the certificate of deposit "to pay the debts of IMSH and [the Darleys] purportedly guarant[e]ed by [the Baileys]," the Baileys again alleged that they would not have guaranteed these obligations

had it not been for the misrepresentations of FNBC concerning whether an SBA loan guaranty was possible.

With regard to the alleged conversion of inventory, the Baileys specifically stated in the proposed amended complaint:

> [FNBC] controlled the transaction between Bailey Tire and IMSH. At the direction of [FNBC], IMSH took inventory not included in the sale. The wholesale value of this inventory was $168,000, the retailer's margin was approximately fifteen percent and the retail value was $193,200. This inventory . . . was the property of Bailey Tire. Had it not been for the wrongful act of [FNBC] in converting this inventory, this sum would have been available . . . for the reduction of the debt of Bailey Tire to [FNBC]. [The Baileys] had guaranteed Bailey Tire's debt to [FNBC]. As it was, the [Baileys] were required to sell their home and other personal assets to pay Bailey Tire's debt.

In their proposed amended complaint, the Baileys sought judgment in the sum of $350,926.17.

6. Baileys Seek Partial Summary Judgment

On November 28, 2005, the Baileys filed a motion for partial summary judgment. The Baileys alleged that they were entitled to judgment as a matter of law on the following issues:

> 1. The contracts attached to the Amended Complaint were executed on the basis of negligent or reckless misrepresentations by [FNBC] or were the result of a mutual mistake. In either event, the [Baileys] are entitled to avoid the contracts.
>
> 2. [FNBC] is liable to the [Baileys] for the sum of $57,726.17 as a result of the wrongful set-off alleged in paragraph nine of the Amended Complaint.
>
> 3. [FNBC] is liable to the [Baileys] in the sum of $100,000 as a result of the transfer of that sum by the [Baileys] as described in paragraph eight of the Amended Complaint.

7. Decision by District Court

The district court heard the parties' pending motions on December 6, 2005. The parties' arguments concerning the motion to amend the complaint are not contained in the record

before us, the record simply indicating "ARGUMENTS OF COUNSEL HEARD." After hearing arguments on the motion to amend, the court stated that the motion was denied. The court subsequently entered an order on December 15 denying the Baileys' motion to amend the complaint. In the December 15 order, the court stated that "after consideration of the pleadings, the original Complaint, the proposed Complaint and argument submitted by counsel, the Court [found] that [the Baileys'] Motion to Amend the original Complaint should be denied." The court did not further specify its reasons for the denial.

The district court also received evidence at the December 6, 2005, hearing with respect to the motions for summary judgment. Because the evidence received in support of the motions for summary judgment was not considered by the court in reaching its decision on the Baileys' motion to amend and because our resolution of the Baileys' assignment of error with respect to that decision is dispositive of this appeal, we have not set forth any of the evidence received by the district court in connection with the motions for summary judgment. On December 29, the court entered an order denying the Baileys' motion for partial summary judgment and granting FNBC's motion for summary judgment. Because they are not relevant to our resolution of the present appeal, we have not further detailed the district court's findings with regard to the motions for summary judgment.

III. ASSIGNMENTS OF ERROR

The Baileys assert that the district court erred in (1) denying their motion to amend the complaint, (2) granting FNBC's motion for summary judgment, and (3) denying their motion for partial summary judgment.

IV. STANDARD OF REVIEW

As stated above, this action was filed on June 21, 2005, and thus, we apply the new rules for notice pleading. See Neb. Ct. R. of Pldg. in Civ. Actions 1 (rev. 2004). Neither this court nor the Nebraska Supreme Court has previously discussed the standard of review for denial of a motion to amend filed under Neb. Ct. R. of Pldg. in Civ. Actions 15(a) (rev. 2003). Because

Nebraska's current notice pleading rules are modeled after the Federal Rules of Civil Procedure, we look to federal decisions for guidance. See *Kellogg v. Nebraska Dept. of Corr. Servs.*, 269 Neb. 40, 690 N.W.2d 574 (2005).

[1] Nebraska's rule 15(a) provides, in relevant part, as follows:

> A party may amend the party's pleading once as a matter of course before a responsive pleading is served or, if the pleading is one to which no responsive pleading is permitted, the party may amend it within 30 days after it is served. Otherwise a party may amend the party's pleading only by leave of court or by written consent of the adverse party, and leave shall be freely given when justice so requires.

Similarly, Fed. R. Civ. P. 15(a) provides that once a responsive pleading has been filed, "a party may amend the party's pleading only by leave of court or by written consent of the adverse party; and leave shall be freely given when justice so requires."

> Under the liberal amendment policy of Federal Rule of Civil Procedure 15(a), a district court's denial of leave to amend pleadings is appropriate only in those limited circumstances in which undue delay, bad faith on the part of the moving partly [sic], futility of the amendment, or unfair prejudice to the non-moving party can be demonstrated.

Roberson v. Hayti Police Dept., 241 F.3d 992, 995 (8th Cir. 2001), citing *Foman v. Davis*, 371 U.S. 178, 83 S. Ct. 227, 9 L. Ed. 2d 222 (1962).

Federal courts generally review the denial of a motion to amend for an abuse of discretion. See, *In re K-tel Intern., Inc. Securities Litigation*, 300 F.3d 881 (8th Cir. 2002); 6 Charles Alan Wright et al., Federal Practice and Procedure § 1484 (2d ed. 1990). Federal case law from the Eighth Circuit indicates, however, that the Eighth Circuit reviews de novo the underlying legal conclusion of whether the proposed amendments to a complaint would have been futile. See, *Marmo v. Tyson Fresh Meats, Inc.*, 457 F.3d 748 (8th Cir. 2006); *U.S. ex rel. Joshi v. St. Luke's Hosp., Inc.*, 441 F.3d 552 (8th Cir. 2006) (citing *U.S. ex rel. Gaudineer & Comito, L.L.P. v. Iowa*, 269 F.3d 932 (8th Cir. 2001)), *cert. denied* 549 U.S. 881, 127 S. Ct. 189, 166 L. Ed. 2d 142. See, also, *Corsello v. Lincare, Inc.*, 428 F.3d

1008 (11th Cir. 2005) (underlying legal conclusion of whether particular amendment to complaint would have been futile is reviewed de novo); *Miller v. Calhoun County*, 408 F.3d 803 (6th Cir. 2005) (where district court draws legal conclusion that amendment would be futile, conclusion is reviewed de novo).

[2,3] We hereby adopt the federal standards of review outlined above. Accordingly, we review the district court's denial of the Baileys' motion to amend under Nebraska's rule 15(a) for an abuse of discretion. However, we review de novo any underlying legal conclusion that the proposed amendments would be futile.

V. ANALYSIS

1. Denial of Motion to Amend Complaint

The Baileys assert that the district court erred in denying their motion to amend the complaint. The parties' arguments before the district court on the Baileys' motion to amend were not recorded in the record, and the court denied the Baileys' motion to amend before it received any evidence in support of or opposition to the parties' motions for summary judgment. The district court denied the Baileys' motion from the bench, without stating its reasons for the denial, and it did not specify its reasons for the denial in the subsequent order ruling on the motion. The court did, however, specify that in denying the motion, it considered the pleadings on file, the proposed amended complaint, and argument submitted by counsel.

[4,5] With regard to Nebraska's rule 15(a), it has been stated of the federal rule 15(a) that

> an abuse of discretion may be found if the court simply denies the motion to amend without offering any explanation. On the other hand, when the reasons for the denial are readily apparent, the failure to include reasons is not a per se abuse of discretion, although the better practice is to state the reasons.

6 Charles Alan Wright et al., Federal Practice and Procedure § 1484 at 598-600 (2d ed. 1990). Because the district court in this case did not specifically state its reasons for its denial of the motion to amend, we examine the record to see if the reasons for the denial are readily apparent. We also take this

opportunity to state that the better practice for Nebraska trial judges denying motions to amend under Nebraska's rule 15(a) is to state their reasons for such denial on the record, either from the bench, in the order ruling on the motion, or both. In determining whether the reasons for the denial are readily apparent, we have examined the pleadings included in the transcript and the proposed amended complaint. Unfortunately, the argument submitted by counsel was not preserved in the record for our review. Although not evidence, such arguments would have been helpful in our examination of the district court's denial of the Baileys' motion to amend. Meaningful appellate review requires a record that elucidates the factors contributing to the lower court judge's decision. *J.B. Contracting Servs. v. Universal Surety Co.*, 261 Neb. 586, 624 N.W.2d 13 (2001). In resolving this assignment of error, we have not considered any of the exhibits introduced in support of the parties' motions for summary judgment, as those exhibits, while part of our record on appeal, were not introduced into evidence in connection with the Baileys' motion to amend and made part of the record of the hearing on the motion to amend. See *Lockenour v. Sculley*, 8 Neb. App. 254, 592 N.W.2d 161 (1999) (in reviewing decision of lower court, appellate court considers only evidence included within record).

(a) Undue Delay, Bad Faith, and Unfair Prejudice

We find no indication of undue delay, bad faith, or unfair prejudice in the record. FNBC presents no arguments alleging that it would have been unfairly prejudiced had the district court granted the Baileys' motion to amend the complaint. FNBC's arguments relate more directly to the futility of any such amendment. For example, FNBC argues that the proposed amended complaint "was equally vulnerable to summary judgment." Brief for appellee at 16. We have addressed FNBC's arguments as to futility below.

[6,7] FNBC also argues that the Baileys' motion to amend was made for the sole purpose of avoiding summary judgment. To the extent that this argument can be seen as an argument that the Baileys' motion was filed with undue delay or in bad faith, we disagree. The Baileys' motion to amend, in large part, was

premised on the parties' alleged mutual mistake and FNBC's alleged misrepresentations as to the possibility of an SBA guarantee of the loans to IMSH, Darley, and Yanke, as well as alleged misrepresentation by FNBC. The Baileys argue that they first learned that it had never been possible to obtain an SBA LowDoc loan guaranty through discovery responses of FNBC dated September 29, 2005. FNBC filed its motion for summary judgment on November 7. The Baileys filed their motion to amend on November 14, a week after FNBC filed its motion for summary judgment. Even if waiting from September 29 to November 14 to file the motion to amend could be considered undue delay, "[d]elay alone is not a reason in and of itself to deny leave to amend; the delay must have resulted in unfair prejudice to the party opposing amendment." *Roberson v. Hayti Police Dept.*, 241 F.3d 992, 995 (8th Cir. 2001). "'The burden of proof of prejudice is on the party opposing the amendment.'" *Id.* We see no proof of prejudice in the record before us with respect to the proposed amendment on the mutual mistake or misrepresentation theories, and FNBC presents no arguments to the contrary. We also note that requests for leave to amend under federal rule 15(a) have, in fact, been granted at hearings on motions to dismiss or for summary judgment. See 6 Charles Alan Wright et al., Federal Practice and Procedure § 1488 (2d ed. 1990).

With respect to the conversion claim, FNBC presents no arguments in its brief on appeal stating specifically that there was any undue delay or bad faith in the Baileys' motion to amend with respect to the conversion claim or that it would have been unfairly prejudiced in any way by such an amendment of the original complaint.

It is not readily apparent from the record that the district court denied the Baileys' motion to amend on the basis of bad faith, undue delay, or unfair prejudice, and we conclude that a denial for any of those reasons in this case would have constituted an abuse of discretion. However, we must still consider whether the proposed amendments to the original complaint would have been futile and whether it is readily apparent from the record that the district court's denial of the motion was based on such futility.

(b) Futility of Amendment

We next consider by what standard to judge whether a proposed amendment under rule 15(a) is futile. Several federal courts hold that at a certain point in pretrial proceedings, a motion to amend the complaint should be judged under a standard comparable or identical to the standard for summary judgment. See Richard Henry Seamon, *An* Erie *Obstacle to State Tort Reform*, 43 Idaho L. Rev. 37 (2006). The First Circuit explains its rationale for applying such a standard as follows:

> If leave to amend is sought before discovery is complete and neither party has moved for summary judgment, the accuracy of the "futility" label is gauged by reference to the liberal criteria of Federal Rule of Civil Procedure 12(b)(6). . . . In this situation, amendment is not deemed futile as long as the proposed amended complaint sets forth a general scenario which, if proven, would entitle the plaintiff to relief against the defendant on some cognizable theory. . . . If, however, leave to amend is not sought until after discovery has closed and a summary judgment motion has been docketed, the proposed amendment must be not only theoretically viable but also solidly grounded in the record. . . . In that type of situation, an amendment is properly classified as futile unless the allegations of the proposed amended complaint are supported by substantial evidence.

Hatch v. Department for Children, Youth & Families, 274 F.3d 12, 19 (1st Cir. 2001) (citations omitted). See, also, *Bethany Pharmacal Co., Inc. v. QVC, Inc.*, 241 F.3d 854 (7th Cir. 2001) (amendment of complaint is futile if added claim would not survive motion for summary judgment). But see *Peoples v. Sebring Capital Corp.*, 209 F.R.D. 428 (N.D. Ill. 2002) (when no summary judgment motion pending, proposed amendment futile only if it could not stand Fed. R. Civ. P. 12(b)(6) motion to dismiss).

The Second Circuit offers a similar explanation as follows:

> It is true that when a cross-motion for leave to file an amended complaint is made in response to a motion to dismiss under Fed.R.Civ.P. 12(b)(6), leave to amend will be denied as futile only if the proposed new claim cannot

> withstand a 12(b)(6) motion to dismiss for failure to state a claim, *i.e.*, if it appears beyond doubt that the plaintiff can plead no set of facts that would entitle him to relief. . . . However, the rule is different where, as here, the cross-motion is made in response to a Fed.R.Civ.P. 56 motion for summary judgment, and the parties have fully briefed the issue whether the proposed amended complaint could raise a genuine issue of fact and have presented all relevant evidence in support of their positions. In the latter situation, even if the amended complaint would state a valid claim on its face, the court may deny the amendment as futile when the evidence in support of the plaintiff's proposed new claim creates no triable issue of fact and the defendant would be entitled to judgment as a matter of law under Fed.R.Civ.P. 56(c).

Milanese v. Rust-Oleum Corp., 244 F.3d 104, 110 (2d Cir. 2001).

Other federal courts appear to not make such a clear distinction between the standard or standards used to judge futility at various points in pretrial proceedings or simply apply the standard used to judge rule 12(b)(6) motions to dismiss. The Eighth Circuit has stated:

> Although ordinarily the decision of whether to allow a plaintiff to amend the complaint is within the trial court's discretion, when a court denies leave to amend on the ground of futility, it means that the court reached a legal conclusion that the amended complaint could not withstand a Rule 12 motion.

In re Senior Cottages of America, LLC, 482 F.3d 997, 1001 (8th Cir. 2007). Other cases from the Eighth Circuit indicate, however, that leave to amend may be denied if the amended pleading could be defeated by a motion for summary judgment or dismissal. See, *Holloway v. Dobbs*, 715 F.2d 390 (8th Cir. 1983); *Collyard v. Washington Capitals*, 477 F. Supp. 1247 (D. Minn. 1979). We also note *Rose v. Hartford Underwriters Ins. Co.*, 203 F.3d 417 (6th Cir. 2000), a case from the Sixth Circuit, stating that the test for futility does not depend on whether the proposed amendment could be potentially dismissed on a motion for summary judgment; instead, a proposed amendment

is futile only if it could not withstand a rule 12(b)(6) motion to dismiss.

[8] We find the explanations and rationale used and applied by the First and Second Circuits to be sound and hold that if leave to amend is sought under Nebraska's rule 15(a) before discovery is complete and before a motion for summary judgment has been filed, the question of whether such amendment would be futile is judged by reference to Neb. Ct. R. of Pldg. in Civ. Actions 12(b)(6) (rev. 2003). Leave to amend in such circumstances should be denied as futile only if the proposed amendment cannot withstand a rule 12(b)(6) motion to dismiss. If, however, the rule 15(a) motion is made in response to a motion for summary judgment and the parties have presented all relevant evidence in support of their positions, then the amendment should be denied as futile only when the evidence in support of the proposed amendment creates no triable issue of fact and the opposing party would be entitled to judgment as a matter of law.

In the present case, we decline to apply the newly enunciated standards for judging the question of futility, given that it does not appear from the record that the question of futility was in fact presented to and passed upon by the district court. In appellate proceedings, the examination by the appellate court is confined to questions which have been determined by the trial court. *Watson v. Watson*, 272 Neb. 647, 724 N.W.2d 24 (2006). In the present case, it is not readily apparent from the record developed in connection with the motion to amend that the district court denied the Baileys' motion to amend on the basis of futility, and we conclude that a denial on that basis would have constituted an abuse of discretion.

2. Ruling on Summary Judgment Motions

[9] The Baileys assert that the district court erred in granting FNBC's motion for summary judgment and in denying their motion for partial summary judgment. Given our above resolution of the Baileys' first assignment of error, we need not decide the Baileys' remaining assignments of error. An appellate court is not obligated to engage in an analysis which is not needed to adjudicate the controversy before it. *Castillo v. Young*, 272 Neb. 240, 720 N.W.2d 40 (2006).

VI. CONCLUSION

The district court abused its discretion in denying the Baileys' motion to amend the complaint. Accordingly, we reverse, and remand for further proceedings consistent with the above analysis.

REVERSED AND REMANDED FOR FURTHER PROCEEDINGS.

KRISTI A. SHAFER, APPELLEE, V. LAYNE D. SHAFER, APPELLANT.
741 N.W.2d 173

Filed November 13, 2007. No. A-06-362.

1. **Property Division: Alimony: Appeal and Error.** The division of property is entrusted to the discretion of the trial court and on appeal will be reviewed de novo on the record and affirmed in the absence of an abuse of the trial court's discretion.
2. **Alimony: Appeal and Error.** In reviewing an award of alimony, an appellate court does not determine whether it would have awarded the same alimony, but whether the trial court's award is untenable so as to deprive a party of a substantial right or just relief.
3. **Property Division: Proof.** The burden of proof to show that property is a nonmarital asset remains with the person making the claim.
4. **Property Division.** How inherited property will be considered in determining the division of property must depend upon the facts of the particular case and the equities involved, and if an inheritance can be identified, it is to be set off to the inheriting spouse and eliminated from the marital estate.
5. ____. Property acquired by one of the parties through gift or inheritance is ordinarily set off to such individual and not considered part of the estate unless the party not receiving the inheritance or gift has substantially cared for the property during the marriage.
6. **Divorce: Equity.** A divorce action sounds in equity.

Appeal from the District Court for Dawson County: JAMES E. DOYLE IV, Judge. Affirmed as modified.

Claude E. Berreckman, Jr., of Berreckman & Berreckman, P.C., for appellant.

Kent A. Schroeder, of Ross, Schroeder & George, L.L.C., for appellee.

IRWIN, SIEVERS, and CASSEL, Judges.

SIEVERS, Judge.

Kristi A. Shafer and Layne D. Shafer were married on April 26, 1991, and Kristi filed a complaint for dissolution of marriage on August 4, 2004. Although a decree of dissolution was entered on June 7, 2005, motions for new trial were sustained in part with the ultimate result that Layne filed his appeal on March 29, 2006—which was timely. The divorce trial involved a number of somewhat complex issues, including Layne's premarital property, Kristi's inherited property, and the earning capacity of the parties for purposes of determining child support. However, Layne assigns only three errors in his appeal. After our review of the transcript, the testimony, the exhibits, and the parties' briefs, we have determined that the case is appropriate for disposition without oral argument pursuant to our authority under Neb. Ct. R. of Prac. 11B(1) (rev. 2006), and we have entered the appropriate order.

PROCEDURAL AND FACTUAL BACKGROUND

Other than the brief procedural history set forth above, the procedural background of this case is unimportant to the resolution of the issues presented on appeal. The necessary factual background from the testimony and exhibits as well as the pertinent portions of the trial judge's decision will be set forth in our discussion of each of the three assignments of error.

ASSIGNMENTS OF ERROR

Layne assigns as error and argues that (1) the trial court erred in determining the amount excluded from the marital estate attributable to a trust distribution received by Kristi; (2) the trial court erred in failing to exclude from the marital estate livestock that was brought into the marriage by Layne; and (3) the trial court erred in awarding Kristi alimony.

STANDARD OF REVIEW

[1,2] The division of property is entrusted to the discretion of the trial court and on appeal will be reviewed de novo on the record and affirmed in the absence of an abuse of the trial court's discretion. *Ritz v. Ritz*, 229 Neb. 859, 429 N.W.2d 707 (1988). In reviewing an award of alimony, an appellate court does not determine whether it would have awarded the same

alimony, but whether the trial court's award is untenable so as to deprive a party of a substantial right or just relief. *Kelly v. Kelly*, 246 Neb. 55, 516 N.W.2d 612 (1994).

ANALYSIS

Trial Court's Treatment of Real Estate Acquired in Part by Distribution of Trust Was Correct.

The evidence shows that in December 1979, Evelyn Swanson (Kristi's mother) established an irrevocable trust known as the Evelyn R. Swanson Trust and named her children as beneficiaries, including Kristi and her sister, Brooke Swanson. The trust, by its terms, was to terminate when Brooke reached her 21st birthday, which occurred on January 15, 1995. Thereafter, all of the beneficiaries of the trust, including Kristi and Brooke, entered into an agreement in April 1995, providing for the distribution of the assets of the trust. The only distribution under the agreement with which we are concerned is provided for in paragraph 7, and it states:

> It is further agreed that KRISTI SHAFER and BROOKE SWANSON shall receive as full payment of their distribution the following described real estate, to-wit: "Southwest Quarter (SW 1/4) of Section 6, Township 10 North, Range 19 West of the 6th P.M., Dawson County, Nebraska[,]" valued at $150,000.00, and that they will assume a remaining indebtedness to Eileen Lahm, contract seller of said real estate, in the amount of $46,000. It is further understood that the debt against the pivot irrigation system located on said real estate shall be paid in full prior to said distribution [we presume from trust assets]. It is further agreed that KRISTI SHAFER and BROOKE SWANSON shall further receive the sum of $32,000.00 in cash, or the same may be used to reduce the indebtedness to Lahm, which would reduce the indebtedness to $14,000.00.

Kristi testified that she received $68,000 from the trust which was used to pay for the southwest quarter of Section 6, but that Layne handled the details of the land transfer. The evidence clearly shows that Kristi's distribution from the trust did not fully cover the acquisition costs of the quarter section at issue. The record contains a joint tenancy deed whereby Brooke

conveyed all of her undivided interest in the quarter section to Layne and Kristi as joint tenants.

Layne testified that there was an agreement that the five siblings would receive $68,000 and that Kristi's brothers "and us, we took it out in real estate, but in our process, we paid her sister off, and we assumed the loan that the Swanson Trust had started with Eileen Lahm . . . . So we just paid Brooke and Eileen Lahm off for six or seven years." Layne testified that Brooke was paid $10,000 down with the balance paid in annual payments over the ensuing years, but that such debt was fully paid, as was the debt to Eileen Lahm, by the time of the parties' separation.

Kristi's testimony was that she should receive a set-aside in the amount of $118,093 from the marital estate for her inheritance from her mother's trust. This amount represented the value of her original inheritance plus the proportional share of the increase in value of the quarter section from $150,000 in 1995 to $260,500 in 2005. The trial court reconciled and summarized the net result of the transactions involving the quarter section in its decree, which we summarize as follows:

Value of land received	$150,000
Money received	32,000
Debt assumed (Lahm)	(46,000)
Evelyn R. Swanson Trust (net received)	136,000
Kristi's one-half share	68,000

The trial court then reasoned as follows:

> Thus, Kristi's inherited share was equal to 45.33% of the value of the land purchased by Kristi and Layne ($68,000.00 divided by $150,000.00). There is no evidence of any substantial improvements to the land after its acquisition and it further appears that the appreciation in value of the land from the 1992 value of $150,000.00 to the present value of $260,500.00 is due to market forces and circumstances separate from any improvements made to the property by the parties. Upon consideration of the evidence, the court finds that Kristi has established that 45.33% of the current value of the 160 acres . . . is attributed to her inheritance and that such value should be set

> aside as her sole and separate property and the same is excluded from the marital estate.

Accordingly, $118,085 was set off to Kristi. Her net marital estate award was $197,725. The net marital estate awarded to Layne was $248,738, and the court ordered Layne to pay Kristi the sum of $25,506 as property division equalization payable over time without interest if such payments were current.

[3,4] Layne's attack on the district court's decision to exclude $118,085 of value of the quarter section, referred to by the parties as the "Lavery Quarter," is initially premised on the ground that the parties owned the property jointly. In rejecting this contention, we rely upon *Schuman v. Schuman*, 265 Neb. 459, 658 N.W.2d 30 (2003), where the court reiterated the familiar rule that the burden of proof to show that property is a nonmarital asset remains with the person making the claim. The Supreme Court in *Schuman* expressly disapproved the language in our opinion in *Gerard-Ley v. Ley*, 5 Neb. App. 229, 558 N.W.2d 63 (1996), where we said: "'[W]hen a husband and wife take title to a property as joint tenants, even though one pays all the consideration therefor, a gift is presumed to be made by the spouse furnishing the consideration to the other . . . .'" The Supreme Court in *Schuman* said that to the extent that our holding in *Gerard-Ley* could be interpreted to mean that nonmarital property which during a marriage is titled in joint tenancy cannot be considered as a nonmarital asset during a divorce, such interpretation of our holding was disapproved. The *Schuman* court then held that how inherited property will be considered in determining the division of property must depend upon the facts of the particular case and the equities involved and that if an inheritance can be identified, it is to be set off to the inheriting spouse and eliminated from the marital estate.

While Layne's brief acknowledges the opinion in *Schuman*, it nonetheless harkens back to the disapproved presumption from *Gerard-Ley* as a basis for us to find an abuse of discretion. We think it clear that *Schuman* did away with any presumption that may have arisen from *Gerard-Ley*. Layne asserts that the circumstances surrounding the acquisition of the property and the fact that they owned it as joint tenants should limit the nonmarital portion of the property to the $68,000 distribution

from the trust. Layne also argues that there is no authority to support the trial court's exclusion of the appreciation in value of the Lavery Quarter from the marital estate. The trial court did not exclude all of the appreciation in the Lavery Quarter from the marital estate, but, rather, found that 45.33 percent of the acquisition cost of the Lavery Quarter was traceable to Kristi's inheritance and thus that she was entitled to have the same percentage of the Lavery Quarter's present value set aside to her and treated as nonmarital property. The trial court has merely performed a simple "tracing," and both its logic and math are unassailable and not an abuse of its discretion, being fully in accord with controlling precedent.

[5] Layne references *Van Newkirk v. Van Newkirk*, 212 Neb. 730, 325 N.W.2d 832 (1982), which is typically cited for the rule that property acquired by one of the parties through gift or inheritance is ordinarily set off to such individual and not considered part of the marital estate unless the party not receiving the inheritance or gift has substantially cared for the property during the marriage. Layne argues that he continuously and exclusively cared for and farmed the property for the entire time that it was owned during the parties' marriage, but no evidence was introduced that the appreciation in the value of the property was the result of any substantial improvement or his farming and care of the Lavery Quarter during the parties' marriage. In the final analysis, the *Van Newkirk* court found that where appreciation in value of a farm inherited by the wife during the marriage was due principally to inflation and not to significant efforts by the husband, the farm should have been set aside to the wife and disregarded in computing the marital estate. Here, the trial court made a specific factual finding that "[t]here is no evidence of substantial improvements to the land after its acquisition" and that its appreciation was due to market forces. Layne does not cite us to any evidence in the record which would belie the trial court's conclusion in this regard. Accordingly, we find that this assignment of error is without merit and that the trial court did not err in setting aside 45.33 percent of the value at the time of trial of the Lavery Quarter to Kristi as nonmarital property. Layne's first assignment of error is without merit.

Should Trial Court Have Excluded Some of Parties' Cattle as Premarital Property?

Layne asserts that his financial statement given to his banker in May 1991 demonstrates that from that time to the time of trial, the number of animals has increased to 166, a 43 percent increase over the number of cattle Layne brought into the marriage. We have already articulated the basic standards about premarital property and tracing. As Layne concedes, livestock are "perishable" with limited useful life, and thus, Layne argues that the court should have applied an equitable standard with respect to his burden to prove that the livestock owned at the time of the marriage are traceable to the livestock owned at the time of trial. Layne's testimony on the issue of the livestock is quite brief, and we quote:

> Q What have you done throughout your marriage with your livestock? Have you replaced livestock as you've sold it?
>
> A I would have had to. If I only had 48 cows then [at the time of the marriage] and I didn't replace them, I wouldn't have 73 today.
>
> Q Has there ever been a period of time during your marriage when you stopped farming or you stopped your livestock operation?
>
> A No.
>
> Q Has it been continuous throughout the course of your marriage?
>
> A Sure.
>
> Q And has the number of livestock remained static or gradually increased?
>
> A Gradually increased until the year 2000, 2001. We had 120, 125 cows, and the drought and everything, we sold back because we didn't have the grass and things to take care of [them].

Kristi's testimony sheds additional light on the subject, and again we quote:

> Q None of those [referencing cattle], unless they became sick and died, would have been junked or —
>
> A No.

Q And they generally wouldn't have been traded either, would they?

A Sold.

Q And when they were sold, was it normally your husband's practice, do you know, to replace them —

A Yes.

Q — with proceeds from the sale?

A Yes.

Q And at the time of your separation as the property statement would indicate, the number of livestock and the value of livestock in the farm operation actually exceed what exists at the time of the marriage, don't they?

A Correct. By a lot, I'm pretty sure.

Exhibit 7, Layne's financial statement of May 20, 1991, a month after the marriage, shows the following with respect to livestock, and he testified that he owned such immediately before the marriage:

48 cows	average weight 1,000 pounds at $700 per head	$33,600
10 heifers	1 year old, average weight 850 pounds at $700 per head	7,000
45 calves	at $200 per head	9,000
3 bulls	average weight 1,500 pounds at $1,000 per head	3,000
10 steers	1 year old, average weight 800 pounds at $700 per head	7,000
		$59,600

In contrast, exhibit 1, the joint property statement of the parties, shows that as of March 2005, the parties possessed the following cattle:

73 cows	bred and open	$ 58,400
90 calves		56,250
3 bulls		3,000
		$117,650

Thus, by comparison of these two exhibits, we see that the value of the parties' cattle herd has increased by the sum of $58,050 during the term of the marriage.

[6] The only Nebraska divorce case involving a set-aside for premarital cattle we have found is an unpublished opinion

of this court in which the setoff was allowed. And while such case is not binding precedent, it reminds us that a divorce action sounds in equity. See *Kouth v. Kouth*, 238 Neb. 230, 469 N.W.2d 791 (1991). Obviously, one cannot draw a straight line from a cow owned by Layne to a cow owned 13 years later by Layne and Kristi, which is the prototypical "tracing" of a premarital asset so as to set it aside to the party who owned it at the time of the marriage. But in our view, the "disposable" nature of a cow does not, by itself, mean that a set-aside for preowned cattle is not allowable. Instead, it seems to us that the issue is resolved according to the particular facts of the case.

In the case before us, the testimony is undisputed that Layne has been involved in the cattle business continuously throughout the marriage, starting with his preowned herd, and that the proceeds from the sale of cattle have been reinvested in replacement cattle—producing the herd that existed at the time of the divorce. Obviously, the herd has grown in number and value during the marriage. And we note that Kristi does not dispute the premarital valuation of Layne's cattle or the value of the cattle at the time of the dissolution. Given the undisputed evidence concerning the cattle herd which we have recounted above, the controlling precedent on set-aside of premarital assets, and the fact that this is an equitable matter, we can discern no reason not to set aside to Layne that portion of the value of the present cattle herd which is attributable to Layne's premarital cattle. In doing so, we view the cattle herd as in effect a single asset—rather than taking a "cow by cow" approach to the tracing issue. Thus, we believe we have simply acknowledged the realities of what happens over time in a cattle operation. In short, while an individual cow which Layne owned in 1991 was long ago turned into hamburger, hot dogs, and shoe leather and thus is not traceable, the cattle herd itself, which has always been part of Layne's farming operation, is in fact traceable. To do otherwise seems to us to exalt form over substance and ignore the equitable nature of a dissolution action. Therefore, the trial court should have set aside to Layne the sum of $59,600 to account for the cattle herd he brought into the marriage.

The change in the property division attributable to this modification is as follows: The trial court found that the

total net marital estate was $456,312, which when reduced by $59,600 becomes $396,712. Thus, half of the net marital estate is $198,356. The trial court awarded Kristi $197,725 as her "net marital estate award" and an equalizing payment of $30,431, which we reduce to $631, which gives Kristi a total of $198,356—one-half of the net marital estate. Layne shall pay such $631 to Kristi within 30 days of the entry of our mandate. In all other respects, we affirm the trial court's property division.

Alimony.

The trial court awarded Kristi alimony at the rate of $40 per month for 78 months, beginning July 1, 2005, for an aggregate of $3,120. In the decree of dissolution, the trial court initially said that "the duration of the marriage supports an award of alimony. . . . Further, the relative economic circumstances of the parties support a finding that while alimony for Kristi is warranted, due to the interruptions in her employment made during the marriage, it should be low in amount."

In discussing alimony, the trial court found that the parties made essentially equal contributions to the marriage, including care of children, and our review of the record certainly justifies that conclusion. Layne argues that when the statutory factors for an award of alimony set forth in Neb. Rev. Stat. § 42-365 (Reissue 2004) are examined, there is no justification for even this rather insignificant sum of alimony, and we agree. Despite the trial court's finding to the contrary, there is absolutely no evidence of any interruption of employment or educational pursuits by Kristi. She is well educated, with a bachelor's degree, as opposed to Layne, who has just a high school diploma and has farmed all of his adult life. Without reciting Kristi's work experience, it is apparent that she has worked in a number of capacities and has extensive job experience. Kristi testified that she did not interrupt a career or any education in order to marry Layne. In addition to the lack of evidence to support an award of alimony, the economic circumstances of the parties do not justify an alimony award, even of $40 per month.

The trial court determined Kristi's net monthly income to be $2,516 and Layne's to be some $600 less per month at $1,900.

With respect to the duration of the marriage as justification of an alimony award, we frankly do not see how "duration of the marriage" operates to justify an alimony award in this case—and particularly to Kristi. Kristi and Layne were both in the same marriage for the same period of time, and the statute does not tell us in whose favor this factor cuts. Of considerably more import are the relative economic circumstances of the parties and the interruption of careers and education. The latter is not a factor, given the absence of evidence, and the economic circumstances would favor an award of alimony to Layne before an award of alimony to Kristi. While the $40 is arguably an inconsequential sum, the fact is that the record does not justify an award of any alimony to Kristi. The district court's award of alimony is unsupported by the record, is untenable, and is an abuse of discretion, and we hereby vacate the alimony award.

CONCLUSION

We modify the decree to provide that Layne shall pay Kristi the sum of $631 within 30 days of our mandate so as to equalize the division of the marital estate. We further modify the decree to eliminate the award of alimony to Kristi. In all other respects, we affirm the decree.

AFFIRMED AS MODIFIED.

STATE OF NEBRASKA, APPELLEE, V.
JONATHAN C. RUSH, APPELLANT.
741 N.W.2d 180

Filed November 13, 2007. No. A-06-1318.

1. **Criminal Law: Convictions: Evidence: Appeal and Error.** When reviewing a criminal conviction for sufficiency of the evidence to sustain the conviction, the relevant question for an appellate court is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.
2. **Sentences: Appeal and Error.** A sentence imposed within statutory limits will not be disturbed on appeal absent an abuse of discretion by the trial court.
3. **Criminal Law: Indictments and Informations.** In a multicount information involving factual variations, such as different times, dates, places, property, or

victims, the finding on one count will not ordinarily be held inconsistent with that on any other count.

4. **Sentences: Appeal and Error.** When a sentence imposed within statutory limits is alleged on appeal to be excessive, the appellate court must determine whether the sentencing court abused its discretion in considering and applying these factors as well as any applicable legal principles in determining the sentence to be imposed.

Appeal from the District Court for Adams County: TERRI HARDER, Judge. Affirmed.

Arthur C. Toogood, Adams County Public Defender, for appellant.

Jon Bruning, Attorney General, and Erin E. Leuenberger for appellee.

SIEVERS, CARLSON, and CASSEL, Judges.

CASSEL, Judge.

INTRODUCTION

A jury found Jonathan C. Rush not guilty of unlawful discharge of a firearm and use of a firearm to commit a felony, but guilty of attempted second degree assault. The district court entered judgment on the verdict and sentenced Rush to 365 days in jail. Rush appeals. We determine that a rational jury could have found the State proved beyond a reasonable doubt that Rush carried and leveled a shotgun at the potential victims but failed to prove by the requisite standard that Rush discharged the shotgun. We affirm.

BACKGROUND

Justin E. and Courtney D. previously had a romantic relationship. In March 2006, Courtney began living with Rush, her new boyfriend. Courtney's new relationship became a source of conflict between Justin and Rush.

On the evening of April 15, 2006, Justin drove by Rush's house. Shortly thereafter, Justin received three calls on his cellular telephone from Courtney's telephone number. Justin answered the third call, and it was Rush inquiring why Justin was driving by Rush's house. Words and threats were exchanged. Justin and his two passengers then drove slowly by Rush's house

again and saw Rush come out on the porch carrying a shotgun. Justin testified that Rush walked out the door holding the shotgun straight up in the air and that "as [Rush] walked out he turned towards my car and he just drew it down like that." Justin then drove off and heard the noise of a shotgun blast, but he did not see the muzzle flash. One of the passengers testified that he ducked down when Rush pointed the shotgun at the vehicle and that 2 or 3 seconds later, he heard a "loud shot." Rush's next-door neighbors also testified about hearing a "loud bang" that sounded very close. Justin later noticed damage to his vehicle consistent with damage caused by a shotgun.

The State charged Rush with unlawful discharge of a firearm, use of a firearm to commit a felony, attempted second degree assault, and criminal mischief. The State later dismissed the criminal mischief charge. The court conducted a jury trial on September 11 and 12, 2006.

Courtney testified that on the night in question, Justin stopped his vehicle in front of Rush's house, Rush went outside on the porch, Justin "peeled off," and Courtney heard a noise as Rush reentered the house. Rush testified that he went out on the porch with the intent to fight Justin but that before he could even walk down the steps, the vehicle "screeched off" and Rush heard a "loud boom." Rush denied having a shotgun at the house or carrying any weapons with him when he went out on the porch, and Courtney provided similar testimony.

The jury found Rush not guilty of unlawful discharge of a firearm and use of a firearm to commit a felony, but guilty of attempted second degree assault. The district court later sentenced Rush to 365 days in jail.

Rush timely appeals to this court.

ASSIGNMENTS OF ERROR

Rush alleges that the court erred in (1) finding sufficient evidence to support the conviction and (2) imposing an excessive sentence.

STANDARD OF REVIEW

[1] When reviewing a criminal conviction for sufficiency of the evidence to sustain the conviction, the relevant question

for an appellate court is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *State v. Gutierrez*, 272 Neb. 995, 726 N.W.2d 542 (2007).

[2] A sentence imposed within statutory limits will not be disturbed on appeal absent an abuse of discretion by the trial court. *State v. Archie*, 273 Neb. 612, 733 N.W.2d 513 (2007).

ANALYSIS

Sufficiency of Evidence.

Rush argues that the State failed to establish beyond a reasonable doubt the elements of attempted second degree assault. He asserts, "The finding that the evidence was not sufficient to show that [Rush] discharged a firearm at [Justin's] automobile leaves no evidence that any other dangerous instrument was available for [Rush] to use in an attempted [sic] to cause bodily injury." Brief for appellant at 7. Although Rush frames his argument upon sufficiency of the evidence, he relies in part upon a claim that the verdicts are inconsistent.

[3] In a multicount information involving factual variations, such as different times, dates, places, property, or victims, the finding on one count will not ordinarily be held inconsistent with that on any other count. See *State v. Ladehoff*, 228 Neb. 812, 424 N.W.2d 361 (1988). The Nebraska Supreme Court has also declined to find inconsistent verdicts where the evidence relied on in the different counts is not identical, see *State v. Steinmark*, 195 Neb. 545, 239 N.W.2d 495 (1976), or where the counts describe two separate offenses and are not inconsistent, see *State v. Whipple*, 189 Neb. 259, 202 N.W.2d 182 (1972). We examine the counts and the evidence to determine if a rational fact finder could acquit Rush of one offense and find him guilty of the other.

The court instructed the jury that in order to convict Rush of unlawful discharge of a firearm, the jury had to find beyond a reasonable doubt that Rush "intentionally discharge[d] a firearm at an occupied motor vehicle." In order to convict Rush of attempted second degree assault, the jury needed to find beyond a reasonable doubt that Rush "intentionally engaged in conduct

which, under the circumstances as he believed them to be, constituted a substantial step in a course of conduct intended to culminate in his commission of the crime of Second Degree Assault, to-wit: intentionally or knowingly causing bodily injury to another with a dangerous instrument."

Under the facts of this case, a rational jury could find beyond a reasonable doubt, based on the testimony of what the witnesses saw, that Rush took a shotgun onto the porch and could also find that the State failed to prove beyond a reasonable doubt that Rush fired the shotgun. The witnesses did not see the shotgun discharge. Even though some of the witnesses testified that they heard sounds characterized by one as "a shotgun blast" and by others as "a loud shot" or "loud bang," the jury was not bound to accept the inference that the sound came from the shotgun. Thus, if the jury found that the State failed to prove beyond a reasonable doubt that Rush did discharge the shotgun, the jury could not find Rush guilty of unlawful discharge of a firearm. But, the jury could still find that the State proved beyond a reasonable doubt that Rush carried a shotgun and leveled it at the vehicle and find that he thereby intentionally engaged in conduct which constituted a substantial step toward intentionally or knowingly causing bodily injury, with a shotgun, to Justin or Justin's passengers. Viewing the evidence in the light most favorable to the State, a rational trier of fact could have found that the State proved the essential elements of attempted second degree assault beyond a reasonable doubt and that the State failed to prove by the requisite standard the elements of unlawful discharge of a firearm. There is sufficient evidence to support the conviction.

Excessiveness of Sentence.

[4] Rush also argues that the court imposed an excessive sentence. The factors to be considered by a sentencing court are well known, and we need not recite them here. See *State v. Archie*, 273 Neb. 612, 733 N.W.2d 513 (2007). When a sentence imposed within statutory limits is alleged on appeal to be excessive, the appellate court must determine whether the sentencing court abused its discretion in considering and applying these factors as well as any applicable legal principles

in determining the sentence to be imposed. *Id.* The sentence imposed was within statutory limits, and we have examined the record concerning all relevant factors and applicable legal principles. We find no abuse of discretion by the district court in its determination of the sentence.

CONCLUSION

We conclude that the jury's verdict is supported by the evidence and that the district court's sentence did not constitute an abuse of discretion.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE V.
WILLIAM P. SUTTON, APPELLANT.
741 N.W.2d 713

Filed November 20, 2007. No. A-06-1297.

1. **Rules of Evidence.** In proceedings where the Nebraska Evidence Rules apply, the admissibility of evidence is controlled by the Nebraska Evidence Rules; judicial discretion is involved only when the rules make such discretion a factor in determining admissibility.
2. **Rules of Evidence: Appeal and Error.** Where the Nebraska Evidence Rules commit the evidentiary question at issue to the discretion of the trial court, the admissibility of evidence is reviewed for an abuse of discretion.
3. **Rules of Evidence: Other Acts.** The admissibility of evidence under Neb. Evid. R. 404(2), Neb. Rev. Stat. § 27-404(2) (Reissue 1995), must be determined upon the facts of each case and is within the discretion of the trial court.
4. ____: ____. Neb. Evid. R. 404(2), Neb. Rev. Stat. § 27-404(2) (Reissue 1995), prohibits the admission of evidence of other bad acts for the purpose of demonstrating a person's propensity to act in a certain manner.
5. ____: ____. Evidence of other crimes which is relevant for any purpose other than to show the actor's propensity is admissible under Neb. Evid. R. 404(2), Neb. Rev. Stat. § 27-404(2) (Reissue 1995).
6. **Evidence: Words and Phrases.** Evidence that is offered for a proper purpose is often referred to as having "special" or "independent" relevance, which means its relevance does not depend on its tendency to show propensity.
7. **Rules of Evidence: Other Acts.** The admissibility of evidence under Neb. Evid. R. 404(2), Neb. Rev. Stat. § 27-404(2) (Reissue 1995), must be determined upon the facts of each case and is within the discretion of the trial court.
8. ____: ____. Evidence of other bad acts falls into two categories under Neb. Evid. R. 404(2), Neb. Rev. Stat. § 27-404(2) (Reissue 1995), according to the basis of the relevance of the acts: (1) evidence which is relevant only to show propensity,

which is not admissible, and (2) otherwise relevant (nonpropensity) evidence, which is admissible.

9. ____: ____. The reason for the rule refusing to allow evidence of other crimes is that such evidence, despite its relevance, creates the risk of a decision by the trier of fact on an improper basis.
10. **Evidence: Other Acts.** The exclusion of other crimes evidence offered to show a defendant's propensity protects the presumption of innocence and is deeply rooted in our jurisprudence.
11. **Rules of Evidence: Other Acts: Appeal and Error.** An appellate court's analysis under Neb. Evid. R. 404(2), Neb. Rev. Stat. § 27-404(2) (Reissue 1995), considers (1) whether the evidence was relevant for some purpose other than to prove the character of a person to show that he or she acted in conformity therewith, (2) whether the probative value of the evidence is substantially outweighed by its potential for unfair prejudice, and (3) whether the trial court, if requested, instructed the jury to consider the evidence only for the limited purpose for which it was admitted.
12. **Evidence: Other Acts: Intent: Proof.** Evidence of other crimes which are similar to the crime charged is relevant and admissible when it tends to prove a particular criminal intent which is necessary to constitute the crime charged.
13. **Criminal Law: Words and Phrases.** Motive is defined as that which leads or tempts the mind to indulge in a criminal act.
14. **Criminal Law: Intent: Proof.** Even when proof of motive is not an element of a crime, motive for the crime charged is relevant to the State's proof of the intent element.
15. **Sexual Assault: Intent.** Intent is not an element of first degree sexual assault as defined by Neb. Rev. Stat. § 28-319 (Reissue 1995).
16. **Criminal Law: Trial: Juries: Evidence: Appeal and Error.** In a jury trial of a criminal case, an erroneous evidentiary ruling results in prejudice to a defendant unless the State demonstrates that the error was harmless beyond a reasonable doubt.
17. **Verdicts: Juries: Appeal and Error.** Harmless error exists when there is some incorrect conduct by the trial court which, on review of the entire record, did not materially influence the jury in reaching a verdict adverse to a substantial right of the defendant.
18. ____: ____: ____. In a harmless error review, an appellate court looks at the evidence upon which the jury rested its verdict; the inquiry is not whether in a trial that occurred without the error a guilty verdict would surely have been rendered, but, rather, whether the guilty verdict rendered in the trial was surely unattributable to the error.
19. **Criminal Law: Evidence: New Trial: Appeal and Error.** Upon finding error in a criminal trial, the reviewing court must determine whether the evidence presented by the State was sufficient to sustain the conviction before the cause is remanded for a new trial.
20. **Double Jeopardy: Evidence: New Trial: Appeal and Error.** The Double Jeopardy Clause does not forbid a retrial so long as the sum of the evidence offered by the State and admitted by the trial court, whether erroneously or not, would have been sufficient to sustain a guilty verdict.

Appeal from the District Court for Sheridan County: PAUL D. EMPSON, Judge. Reversed and remanded for a new trial.

Paul Wess for appellant.

Jon Bruning, Attorney General, and George R. Love for appellee.

SIEVERS, CARLSON, and CASSEL, Judges.

CARLSON, Judge.

INTRODUCTION

William P. Sutton was convicted in the district court for Sheridan County of first degree sexual assault, second degree assault, and use of a weapon to commit a felony. Sutton appeals his convictions, arguing that the trial court erred in allowing the State to present testimony concerning a prior bad act. Based on the reasons that follow, we reverse, and remand for a new trial.

BACKGROUND

On March 24, 2006, an information was filed in the district court for Sheridan County, charging Sutton with one count of first degree sexual assault in violation of Neb. Rev. Stat. § 28-319 (Reissue 1995), one count of second degree assault in violation of Neb. Rev. Stat. § 28-309 (Cum. Supp. 2006), and one count of use of a weapon to commit a felony in violation of Neb. Rev. Stat. § 28-1205 (Reissue 1995). The charges arose out of allegations made by Sutton's girlfriend, Jennifer C., with whom he lived at the time. Sutton entered pleas of not guilty.

On July 10, 2006, the State filed a motion for hearing pursuant to Neb. Evid. R. 404, Neb. Rev. Stat. § 27-404 (Reissue 1995), based in its intent to offer prior bad act evidence. Specifically, the State wanted to present evidence pertaining to Sutton's prior conviction for third degree assault on Jennifer. The State asserted that the evidence was admissible to show proof of motive, opportunity, intent, and knowledge. On August 1, a pretrial evidentiary hearing was held on the State's motion. The State presented a certified copy of an information filed August 19, 2004, in the district court for Box Butte County,

charging Sutton with third degree assault and first degree false imprisonment. The State also offered a journal entry in regard to those charges, which journal entry stated that a plea agreement was reached and that Sutton pled guilty to the third degree assault charge and the State dismissed the false imprisonment charge. Jennifer testified at the evidentiary hearing. She testified that on June 19, 2004, she and Sutton lived together, and that after having a disagreement, Jennifer went to their apartment to get some clothes and intended to leave and stay overnight somewhere else. Jennifer testified that Sutton would not let her leave the apartment and that he got angry and hit her in the face with his fist, knocking her to the floor. She testified that when she tried to get up, Sutton kicked her in the face. Jennifer testified that during this time, Sutton was telling her that she was not going to leave. She testified that once she got up off the floor, Sutton started hitting her with the belt he had been wearing. Jennifer testified that she eventually was able to dial the 911 emergency dispatch service and that the police arrived shortly thereafter and arrested Sutton.

On September 5, 2006, the trial court entered an order finding that the State had proved Sutton's prior bad act by clear and convincing evidence and that such act had independent relevance. Therefore, the trial court granted the State's motion to present rule 404 evidence.

On September 13, 2006, a jury trial commenced. Jennifer testified that in January 2006, she and Sutton lived together in Rushville, Nebraska, along with Jennifer's child and Sutton's two children. Sutton and Jennifer do not have any children together. Jennifer testified that on January 14, she and Sutton both agreed to end their relationship. Jennifer told Sutton that he and his two children would need to find someplace else to live. Jennifer testified that Sutton wanted to continue living with Jennifer until the end of the school year, but that she did not agree to that arrangement. Jennifer testified that around 7 p.m., Sutton left the residence and went to a bar. Between 7 and 7:30 p.m., Jennifer and her child went to the bar where Sutton was located and Jennifer gave Sutton his car keys. She told him that she was going out of town, that there was no one at their house and the door was locked, and that she did not

know where Sutton's two children were. Jennifer and her child then drove to Jennifer's mother's house in Pine Ridge, South Dakota. Jennifer testified that after talking with her mother, she left her mother's house and met a friend in Pine Ridge. Jennifer testified that she returned to her mother's house between 1:30 and 2 a.m. and lay down for awhile. She testified that she later decided it was safe to return to her home in Rushville and that she arrived at her house between 5 and 5:30 a.m. on January 15. Jennifer was asked why it would not be safe to go home, to which she replied, "Because of what was said and that I didn't know how [Sutton] was going to react or anything." Jennifer testified that when she arrived home, she went inside the house and walked through all the rooms to make sure that Sutton was not there. Jennifer testified that she then lay down on the couch in the living room to sleep and that sometime later, she opened her eyes and Sutton was standing over her, asking her where his children were. Jennifer testified that she believed Sutton had been drinking alcohol, based on his stance and his speech. She testified that Sutton asked her repeatedly where his children were and that she responded that she did not know. Jennifer testified that Sutton then began hitting her with the handle of a screwdriver while continuing to ask her where his children were. She testified that Sutton also told her that he would give her a reason to leave. Jennifer testified that he then took off the belt he was wearing and started hitting her with it. Jennifer testified that after hitting her multiple times with the belt, Sutton told her to go into the bedroom. She testified that she told Sutton "no," to which he responded that he was going to continue hitting her if she did not go into the bedroom. Jennifer testified that she went into the bedroom and sat at the edge of the bed. She testified that Sutton next told her to take her clothes off and that when she refused, Sutton told her he was going to hurt her. Jennifer testified that she took her clothes off and that Sutton pushed her down on the bed and had sexual intercourse with her without her consent. Jennifer testified that when Sutton was done forcing himself on her, he fell asleep, at which time Jennifer got dressed and went to the police station. She testified that at the police station, she told an officer what had happened and made a written statement,

and that the officer then took her to a hospital, where a rape kit examination was performed.

During cross-examination of Jennifer, Sutton's counsel asked her about her and Sutton's decision to breakup on January 14, 2006. The following exchange occurred:

> Q. Okay. Now, you had testified earlier that you and . . . Sutton had agreed to go your separate ways, correct?
>
> A. Yes.
>
> Q. And at that point it was a mutual agreement to end your relationship; is that correct?
>
> A. Yes.
>
> Q. And it was an amicable breakup?
>
> A. Yes, we both agreed on it.
>
> Q. In fact, you agreed thereafter you would remain friends; is that correct?
>
> A. Yes, as far as I was concerned.

In response to defense counsel's questions on cross-examination, the State asked Jennifer the following questions on redirect examination: "Q. If this was an amicable breakup, why were you scared of him? A. Because I know how he can get. Q. What do you mean? A. He got abusive towards me before. Q. Where was that? A. Down in Alliance." At that point, Sutton's counsel objected based on relevance and rule 404 evidence. The trial court overruled the objection and allowed the line of questioning to continue. Sutton's counsel then asked for and was given a continuing objection. Jennifer further explained that the prior assault happened 1½ to 2 years earlier, that she and Sutton were living together at the time, that Sutton had been drinking on the night the incident occurred, and that Sutton hit her with his belt. Jennifer testified that Sutton became angry when he discovered that she had gone to her and Sutton's apartment to get some clothes because she intended to stay overnight at a friend's house. She further testified that the police were called and that Sutton was arrested.

In addition to Jennifer's testimony, the State's evidence included testimony from the police officer whom Jennifer spoke to at the police station on January 15, 2006, the nurse and doctor who examined Jennifer and performed the rape kit at the hospital, and Jennifer's mother. Sutton did not present any evidence.

At the end of trial, the jury found Sutton guilty on all three charges. The trial court sentenced Sutton to 10 to 20 years' imprisonment on the first degree sexual assault conviction, 2 to 5 years' imprisonment on the second degree assault conviction, and 2 to 5 years' imprisonment on the use of a weapon to commit a felony conviction. The sentences were ordered to run consecutively.

ASSIGNMENT OF ERROR

Sutton assigns that the trial court erred in failing to sustain his objections to the State's introduction of prior bad act evidence.

STANDARD OF REVIEW

[1-3] In proceedings where the Nebraska Evidence Rules apply, the admissibility of evidence is controlled by the Nebraska Evidence Rules; judicial discretion is involved only when the rules make such discretion a factor in determining admissibility. *State v. Kuehn*, 273 Neb. 219, 728 N.W.2d 589 (2007); *State v. Robinson*, 272 Neb. 582, 724 N.W.2d 35 (2006). Where the Nebraska Evidence Rules commit the evidentiary question at issue to the discretion of the trial court, the admissibility of evidence is reviewed for an abuse of discretion. *State v. Wisinski*, 268 Neb. 778, 688 N.W.2d 586 (2004); *State v. Harris*, 263 Neb. 331, 640 N.W.2d 24 (2002). The admissibility of evidence under rule 404(2) must be determined upon the facts of each case and is within the discretion of the trial court. *State v. Wisinski, supra*; *State v. Harris, supra*.

ANALYSIS

[4-7] Sutton assigns that the trial court erred in failing to sustain his objections to the State's introduction of prior bad act evidence. Rule 404(2) provides:

> Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he or she acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

Rule 404(2) prohibits the admission of evidence of other bad acts for the purpose of demonstrating a person's propensity

to act in a certain manner. *State v. Kuehn, supra*; *State v. McPherson*, 266 Neb. 715, 668 N.W.2d 488 (2003). Evidence of other crimes which is relevant for any purpose other than to show the actor's propensity is admissible under rule 404(2). *State v. Kuehn, supra*; *State v. McPherson, supra*. Evidence that is offered for a proper purpose is often referred to as having "special" or "independent" relevance, which means its relevance does not depend on its tendency to show propensity. *State v. Sanchez*, 257 Neb. 291, 597 N.W.2d 361 (1999); *State v. McManus*, 257 Neb. 1, 594 N.W.2d 623 (1999). The admissibility of evidence under rule 404(2) must be determined upon the facts of each case and is within the discretion of the trial court. *State v. Kuehn, supra*; *State v. Wisinski, supra*.

[8] Evidence of other bad acts falls into two categories under rule 404(2), according to the basis of the relevance of the acts: (1) evidence which is relevant only to show propensity, which is not admissible, and (2) otherwise relevant (nonpropensity) evidence, which is admissible. *State v. Kuehn, supra*; *State v. McManus, supra*.

[9,10] The reason for the rule refusing to allow evidence of other crimes is that such evidence, despite its relevance, creates the risk of a decision by the trier of fact on an improper basis. *State v. Sanchez, supra*; *State v. Myers*, 15 Neb. App. 308, 726 N.W.2d 198 (2006). The exclusion of other crimes evidence offered to show a defendant's propensity protects the presumption of innocence and is deeply rooted in our jurisprudence. *Id.*

[11] An appellate court's analysis under rule 404(2) considers (1) whether the evidence was relevant for some purpose other than to prove the character of a person to show that he or she acted in conformity therewith, (2) whether the probative value of the evidence is substantially outweighed by its potential for unfair prejudice, and (3) whether the trial court, if requested, instructed the jury to consider the evidence only for the limited purpose for which it was admitted. *State v. Trotter*, 262 Neb. 443, 632 N.W.2d 325 (2001); *State v. Sanchez, supra*.

Therefore, to determine whether the prior bad act evidence was admissible in the instant case, we first consider whether such evidence was relevant for some purpose other than to show Sutton's propensity to commit the crimes charged in the

instant case. A jury instruction is the only indication on the record before us of the purpose for which the trial court allowed the evidence of Sutton's prior assault on Jennifer. The instructions given to the jury before it began deliberating included an instruction which stated that the prior bad act evidence was admitted for the limited purpose of helping the jury decide whether Sutton had the motive and intent to commit the crimes with which he was charged. Thus, we will consider motive and intent as possible purposes for admitting the evidence.

[12-14] Evidence of other crimes which are similar to the crime charged is relevant and admissible when it tends to prove a particular criminal intent which is necessary to constitute the crime charged. *State v. Kuehn*, 273 Neb. 219, 728 N.W.2d 589 (2007). Motive is defined as that which leads or tempts the mind to indulge in a criminal act. *State v. Burdette*, 259 Neb. 679, 611 N.W.2d 615 (2000); *State v. Sanchez, supra*. Even when proof of motive is not an element of a crime, motive for the crime charged is relevant to the State's proof of the intent element. *State v. Burdette, supra*. See *State v. McBride*, 250 Neb. 636, 550 N.W.2d 659 (1996).

[15] Intent is not an element of first degree sexual assault as defined by § 28-319, one of the offenses with which Sutton was charged. See *State v. Sanchez*, 257 Neb. 291, 597 N.W.2d 361 (1999). Intent, however, must be proved with respect to the second degree assault charge. Section 28-309(1)(a) provides that "[a] person commits the offense of assault in the second degree if he or she: (a) Intentionally or knowingly causes bodily injury to another person with a dangerous instrument." The State therefore was required to prove that Sutton intended to cause bodily injury to Jennifer with a dangerous instrument. The State seems to argue that the prior bad act evidence is admissible to show motive and intent because the prior bad act is similar to the events in the instant case. In both instances, Sutton and Jennifer were living together, Jennifer was leaving Sutton or they were breaking up, Sutton had been drinking, and Sutton became angry and assaulted Jennifer, using his belt in both instances.

In *State v. McManus*, 257 Neb. 1, 594 N.W.2d 623 (1999), the Nebraska Supreme Court was faced with a situation in which

the defendant, on a prior occasion and in the crime charged, had been drinking at a bar, became intoxicated and angry, and used a gun to intimidate another individual. The State argued that evidence of the prior act was admissible to show his intent, because the two occurrences were factually similar. The court found:

> The most obvious reason why the similarity between the two acts may show the intent of [the defendant] in the instant case is the inference that [the defendant] is the type of person who acts with violent intent when he is angry. However, this is classic propensity reasoning, and thus, although the evidence may be relevant for that purpose, it must be excluded under rule 404(2).

State v. McManus, 257 Neb. at 10, 594 N.W.2d at 630.

In the instant case, the prior bad act evidence implies that Sutton is the type of person who acts with violent intent when he wants to control someone, particularly Jennifer. Like *McManus*, this is classic propensity reasoning and may not be used to show Sutton's motive and intent in the crimes charged. Thus, we conclude that the prior bad act evidence was not offered for a proper purpose under rule 404(2) and, therefore, that the trial court abused its discretion in admitting such evidence at trial. Because the evidence was not offered for a proper purpose under rule 404(2), we need not address the second and third analytical steps set forth in *State v. Trotter*, 262 Neb. 443, 632 N.W.2d 325 (2001), in order to reach our conclusion that the trial court abused its discretion in receiving such evidence.

The State puts forth an argument in which it contends that the prior bad act evidence was admissible regardless of whether it was or was not admissible under rule 404(2), because Sutton "'opened the door'" for evidence of the prior assault. Brief for appellee at 8. The State points out that no prior bad act evidence was introduced during direct examination of Jennifer. It contends that Sutton "opened the door" to such evidence by introducing evidence during cross-examination of Jennifer that Jennifer and Sutton's relationship ended amicably, thereby leaving the jury with the impression that Sutton had no motive to assault Jennifer. The State further contends that the testimony about the prior assault during redirect of Jennifer simply rebutted the evidence brought out by Sutton on cross-examination

by having Jennifer explain why she was afraid of Sutton if the breakup was amicable.

We conclude that Sutton did not "open the door" in regard to the prior assault. As previously stated, the State argues that Jennifer's amicable breakup testimony on cross-examination left the jury with the impression that Sutton had no motive to commit the crimes. However, Jennifer testified on direct examination that she and Sutton mutually agreed to end their relationship. Thus, reemphasizing this point on cross-examination did not bring out any new evidence and did not "open the door" in regard to evidence of the prior assault. Jennifer also testified that before Sutton started hitting her with the screwdriver, he asked where his children were and Jennifer told him she did not know. Thus, the jury could have viewed Jennifer's failure to know where Sutton's children were as Sutton's motive for the assault.

[16-18] Having determined that the prior bad act evidence was erroneously admitted, the next question we must address is whether the admission of the evidence was harmless beyond a reasonable doubt. In a jury trial of a criminal case, an erroneous evidentiary ruling results in prejudice to a defendant unless the State demonstrates that the error was harmless beyond a reasonable doubt. *State v. Morrow*, 273 Neb. 592, 731 N.W.2d 558 (2007); *State v. Robinson*, 271 Neb. 698, 715 N.W.2d 531 (2006). Harmless error exists when there is some incorrect conduct by the trial court which, on review of the entire record, did not materially influence the jury in reaching a verdict adverse to a substantial right of the defendant. *Id.* In a harmless error review, we look at the evidence upon which the jury rested its verdict; the inquiry is not whether in a trial that occurred without the error a guilty verdict would surely have been rendered, but, rather, whether the guilty verdict rendered in the trial was surely unattributable to the error. *State v. Morrow, supra*; *State v. McKinney*, 273 Neb. 346, 730 N.W.2d 74 (2007). Upon hearing the evidence of Sutton's previous assault on Jennifer, the jury could have inferred that because Sutton had acted violently against Jennifer in the past, he must have acted in conformity with that character in the instant case, thereby reaching a verdict on an improper basis. Therefore, we cannot say that the

guilty verdict was unattributable to the prior bad act evidence, and we conclude that the erroneous admission of the bad act evidence in the instant case was not harmless error.

[19,20] In addition, upon finding error in a criminal trial, the reviewing court must determine whether the evidence presented by the State was sufficient to sustain the conviction before the cause is remanded for a new trial. *State v. Morrow, supra*; *State v. Anderson*, 258 Neb. 627, 605 N.W.2d 124 (2000). The Double Jeopardy Clause does not forbid a retrial so long as the sum of the evidence offered by the State and admitted by the trial court, whether erroneously or not, would have been sufficient to sustain a guilty verdict. *Id.* We conclude that the evidence was sufficient to sustain Sutton's conviction. As a result, the cause may be remanded for a new trial.

We also find it necessary to note that when the trial court allowed the prior bad act testimony into evidence during Sutton's trial, it did not comply with the requirements set forth in *State v. Sanchez*, 257 Neb. 291, 597 N.W.2d 361 (1999). In *Sanchez*, the Nebraska Supreme Court held that

> the proponent of evidence offered pursuant to rule 404(2) shall, upon objection to its admissibility, be required to state on the record the specific purpose or purposes for which the evidence is being offered and that the trial court shall similarly state the purpose or purposes for which such evidence is received. . . . Any limiting instruction given upon receipt of such evidence should likewise identify only those specific purposes for which the evidence was received.

257 Neb. at 308, 597 N.W.2d at 374 (citation omitted).

In the instant case, Sutton made a rule 404 objection when the State began questioning Jennifer about the prior assault. The court simply overruled the objection. The trial court did not have the State indicate the specific purpose for which the evidence was being offered, and the trial court did not state the purpose for which such evidence was received. The trial court also failed to state such purpose at the time of the hearing required by rule 404(3)—which was an earlier opportunity for the trial court to "state the purpose or purposes" in order to comply with the procedures mandated in *Sanchez*. In its final

instructions to the jury at the close of the case, the court did give a jury instruction in regard to the prior bad act evidence. However, the court did not give a limiting instruction at the time the rule 404 evidence was introduced. We need not consider whether the trial court's failure to abide by the *Sanchez* requirements constitutes reversible error in the instant case, given that we have concluded that the evidence was inadmissible. We simply point it out to remind trial courts of the requirements set forth in *State v. Sanchez, supra*.

CONCLUSION

We conclude that the trial court erroneously admitted evidence of Sutton's prior bad act for an improper purpose and that the admission of this evidence was not harmless error. Accordingly, we reverse, and remand for a new trial in accordance with this opinion.

REVERSED AND REMANDED FOR A NEW TRIAL.

TERRY L. JESSEN, APPELLEE, V.
DONNA J. LINE, APPELLANT.
742 N.W.2d 30

Filed November 27, 2007. No. A-07-076.

1. **Paternity: Appeal and Error.** In a filiation proceeding, questions concerning child custody determinations are reviewed on appeal de novo on the record to determine whether there has been an abuse of discretion by the trial court, whose judgment will be upheld in the absence of an abuse of discretion. In such de novo review, when the evidence is in conflict, the appellate court considers, and may give weight to, the fact that the trial court heard and observed the witnesses and accepted one version of the facts rather than another.
2. **Paternity: Child Support: Appeal and Error.** A trial court's award of child support in a paternity case will not be disturbed on appeal in the absence of an abuse of discretion by the trial court.
3. **Paternity: Attorney Fees: Appeal and Error.** An award of attorney fees in a paternity action is reviewed de novo on the record to determine whether there has been an abuse of discretion by the trial judge.
4. **Motions for Continuance: Appeal and Error.** A motion for continuance is addressed to the discretion of the trial court, whose ruling will not be disturbed on appeal in the absence of an abuse of discretion.

5. **Child Custody.** According to Neb. Rev. Stat. § 42-364(5) (Cum. Supp. 2006), the court may place a minor child in joint custody after conducting a hearing in open court and specifically finding that joint custody is in the best interests of the minor child regardless of any parental agreement or consent.
6. ____. Fundamental fairness requires that when a trial court determines at a general custody hearing that joint physical custody is, or may be, in a child's best interests, but neither party has requested this custody arrangement, the court must give the parties an opportunity to present evidence on the issue before imposing joint custody.
7. ____. The same considerations of notice in the context of a joint physical custody order—the opportunity to be heard and present evidence on the issue—are equally applicable when the trial court is considering making an award of joint legal custody, and therefore the court must give the parties an opportunity to present evidence on the issue of joint legal custody before imposing such.

Appeal from the District Court for Scotts Bluff County: ROBERT O. HIPPE, Judge. Affirmed in part as modified, and in part reversed and remanded for further proceedings.

Jeffrey L. Hansen, of Simmons Olsen Law Firm, P.C., for appellant.

James L. Zimmerman, of Zimmerman Law Firm, P.C., L.L.O., for appellee.

SIEVERS, CARLSON, and CASSEL, Judges.

SIEVERS, Judge.

Donna J. Line appeals from the decision of the district court for Scotts Bluff County that determined Terry L. Jessen was the biological father of Donna's minor child, Parker Jessen; awarded joint legal custody of Parker to both parties and awarded primary physical custody to Donna; awarded Terry reasonable visitation; and awarded Donna $1,000 per month in child support beginning January 1, 2007.

We affirm the district court's award of child support in the amount of $1,000 per month; however, we find that such award should be retroactive to January 1, 2005, and order modification of the award to that extent. We find that the trial court erred in awarding the parties joint legal custody of Parker without conducting the appropriate hearing. We therefore reverse, and remand the cause for further proceedings on this issue of legal custody.

FACTUAL BACKGROUND

Donna is the natural mother and Terry is the natural father of Parker, born on September 8, 1997. Donna and Terry were never married, but were in a relationship for 9 years beginning in June 1995. At the time of Parker's birth, Donna was living in Colorado and Terry was living in Scottsbluff, Nebraska. In 2001, Donna and Parker moved to Nebraska to live with Terry. In 2004, Donna and Terry parted ways, apparently permanently. In October 2004, Donna and Parker moved to Colorado.

Donna is a teacher in Colorado and says she earns $36,000 per year. Terry is involved in various business entities and farming, and he owns or has ownership interest in hotels, numerous duplexes and homes, and 8 to 10 farms. He also has ownership interest in numerous corporations. Terry's holdings are substantial. To put Terry's finances in perspective, he testified that his personal debt is more than $9 million and that his corporate debt is more than $13 million, and on cross-examination, Terry agreed that his assets would exceed his debt.

PROCEDURAL BACKGROUND

On December 9, 2004, Terry filed his "Complaint to Establish Paternity and Award Custody," alleging that he is the natural father of Parker. Terry asked the district court to award him sole custody of Parker. On December 13, Donna filed a motion for an ex parte custody order granting her custody of Parker. The district court granted Donna's motion.

On December 15, 2004, Donna filed her answer and counterclaim to establish paternity and award custody. Donna asked the district court to determine that Terry is Parker's father; grant her sole custody of Parker, subject to Terry's reasonable rights of visitation; order Terry to pay child support; and require that the parties are to meet at a midway point to exchange Parker for visitation. That same day, Donna also filed motions for temporary custody and child support.

After a hearing, the district court filed its journal entry on December 28, 2004, granting Donna temporary custody of Parker, subject to Terry's specific visitation schedule set forth in such journal entry. Temporary child support was denied due to lack of appropriate evidence.

On December 29, 2004, Donna filed another motion for temporary child support. After a hearing, the district court entered an order on February 2, 2005, directing Terry to pay Donna temporary child support of $346.76 per month, beginning January 1, 2005. A child support worksheet was attached to the district court's order.

On July 7, 2005, Donna filed a motion to compel Terry to respond to discovery, particularly in regard to information and documents concerning his businesses necessary to determine his income and/or earning capacity. In the district court's journal entry filed on August 2, the court sustained Donna's motion and directed Terry to respond to certain discovery requests. The district court directed Terry to "provide three years personal bank statements and any entities that he has an interest in."

On September 2, 2005, Donna again filed a motion to compel Terry to respond to discovery pursuant to the court's previous order. The court's journal entry filed September 19 shows that Terry was again ordered to comply with the discovery requests. Terry was ordered to "produce tax returns filed in the years 2002, 2003, 2004, and the past three years of bank statements, with copies of cancelled checks and deposit slips in the name of [Terry], plus any business entities he controls."

On December 21, 2005, Donna again filed a motion to compel Terry to respond to discovery pursuant to the court's previous orders. The court's journal entry filed January 17, 2006, shows that Terry was ordered to "respond to the request for production of documents in writing as to documents allowed in the September [19], 2005 Order by identifying their location and cooperating with [Donna] to make them available for inspection by the entity having control of the documents by January 27, 2006."

On November 29, 2006, Donna filed a motion to continue the trial, which was to begin that morning, stating that her attorney had not received any financial information from Terry. In support of such motion, Donna's attorney attached his affidavit stating that he had "attempted on several occasions to request financial information from [Terry]," but had not received such information. Counsel stated, "It is imperative that we have [Terry's] financial information in order to proceed with this

case." Also on November 29, Donna filed an application for attorney fees in the amount of $8,290.75 and attached an itemized statement of such fees and expenses. Donna's motion to continue was denied, the trial court reasoning that the case had already been delayed a number of times and that there was no indication further delay would solve the problem—which we assume was Terry's failure to provide financial disclosure concerning his various enterprises—and trial was held on November 29.

On December 11, 2006, the district court entered its order establishing paternity, child custody, visitation, and support. The district court determined that Terry is Parker's father, awarded joint legal custody of Parker to both parties and awarded primary physical custody to Donna, awarded Terry reasonable visitation as set forth in the order, and awarded Donna $1,000 per month in child support beginning January 1, 2007. Regarding the child support, the district court said:

> In the court's opinion using child support guidelines in this case would be both unjust and inappropriate. If the court assumes income for Donna at the current amount and averages Terry's last three years of income, the monthly child support would be $71.46 after applying guideline R. Therefore the court deviates from guidelines and orders that Terry pay the sum of $1,000 per month for child support beginning January 1, 2007.

In explaining its reasons for deviating from the guidelines, the district court said:

- Terry has traditionally had very low income reported on his income tax returns. He has made it impossible for Donna to test whether that income is a fair figure to use for purposes of child support because -
  - All of Terry's financial records were seized by a U. S. Government investigation.
  - Terry has replicated some of those records by printing items from his computer (which he apparently still has) and has used those reprints in his own case, but did not furnish anything similar to Donna in discovery.

> ▶ Terry has extensive assets including motels, farms, businesses, commercial property, residential property, and has extensive involvement in family corporations. It is either inaccurate or voluntary limitation of income on Terry's part to assume that his real income is as low as what his tax returns show when one considers these extensive assets that he owns. He is well-able to contribute $1,000 per month to Parker's care.

We read the court's reasoning as addressing in a broad sense the concept of earning capacity as opposed to reported income on Terry's personal tax returns, which were not complete. For example, only the first page of his 2004 personal tax return is in evidence. After Donna's motions to alter and amend the order and for a new trial were overruled on January 4, 2007, she has timely appealed.

ASSIGNMENTS OF ERROR

Donna alleges that the district court erred in (1) awarding joint legal custody to the parties, (2) ordering child support in the amount of $1,000, (3) not making the child support amount retroactive to the date of the temporary order, (4) not awarding Donna attorney fees, and (5) not granting a continuance prior to trial.

STANDARD OF REVIEW

[1] In a filiation proceeding, questions concerning child custody determinations are reviewed on appeal de novo on the record to determine whether there has been an abuse of discretion by the trial court, whose judgment will be upheld in the absence of an abuse of discretion. In such de novo review, when the evidence is in conflict, the appellate court considers, and may give weight to, the fact that the trial court heard and observed the witnesses and accepted one version of the facts rather than another. *State on behalf of Pathammavong v. Pathammavong*, 268 Neb. 1, 679 N.W.2d 749 (2004).

[2] A trial court's award of child support in a paternity case will not be disturbed on appeal in the absence of an abuse of discretion by the trial court. *Henke v. Guerrero*, 13 Neb. App. 337, 692 N.W.2d 762 (2005).

[3] An award of attorney fees in a paternity action is reviewed de novo on the record to determine whether there has been an abuse of discretion by the trial judge. *Cross v. Perreten*, 257 Neb. 776, 600 N.W.2d 780 (1999). Absent such an abuse, the award will be affirmed. *Id*.

[4] A motion for continuance is addressed to the discretion of the trial court, whose ruling will not be disturbed on appeal in the absence of an abuse of discretion. *Johnson v. Ford New Holland*, 254 Neb. 182, 575 N.W.2d 392 (1998).

ANALYSIS

Denial of Motion for Continuance.

On the day the trial was to begin, Donna filed a motion to continue the trial, stating that her attorney had not received any financial information from Terry. The motion was addressed at a hearing, and Donna argued that the only information she had regarding Terry's finances consisted of two personal tax returns, which, in her opinion, were not reliable. Donna argued that it was Terry's duty to provide the court with information about his income and that if his records were seized by government officials, then he should get copies of his tax returns from the government or copies of statements from his banks. Donna argued that without accurate records, the court could not determine child support.

Terry, through counsel, argued that the personal tax returns show the sources of all income and that "whether an individual owns numerous pieces of property, is involved in corporations, or whatever, really has no bearing because it's based upon what his personal income is, and he has his personal tax returns." That argument is repeated here, but we summarily reject the obviously spurious claim that financial records concerning Terry's businesses are neither discoverable nor relevant. The district court denied Donna's continuance saying:

> In the Court's opinion, the problem in this case, it's two years old already. It has been delayed a number of times because [Terry's] financial records were seized pursuant to a search warrant in some federal investigation. And, the Court has made rulings before on whether he is obliged to

> furnish something that he does not have or doesn't have access to.
>
> The thing that bothers me is the continuances and the postponements are without end, even with this affidavit and at the time now of trial. The Court has no hint of what time will do to solve the problem or how much time is needed to solve the problem. So it looks to me like it has been a case that has had interminable delays, and that that will continue into the unknown future. And, the case has to be tried at sometime, and now is a[s] good [a] time as any. There is no indication of delay of another month, or six months, or a year would do any good because we have been in this spot, essentially, stuck on the case for over a year already. So the motion to continue the trial is overruled, and we'll go ahead and proceed with the trial.

The trial commenced immediately upon the court's denial of Donna's motion to continue.

As noted in the procedural background section of this opinion, Donna filed three different motions to compel Terry to produce financial information for entities he has an interest in and each time Donna's motion was granted by the district court. By the time of trial on November 29, 2006, it had been more than 15 months since Terry was first ordered to provide Donna with his business finance records. Despite the orders by the district court, Terry failed to comply with Donna's discovery requests. Terry's conduct in this regard cannot be condoned, but we note that Donna failed to invoke the "persuasive powers" of the court to enforce the discovery orders—for example, by initiating contempt proceedings under Neb. Rev. Stat. § 42-370 (Reissue 2004). See, also, *Jessen v. Jessen*, 5 Neb. App. 914, 567 N.W.2d 612 (1997).

The district court, clearly tired of the case dragging on for so long, decided to proceed with the trial without Terry's business finance records. While we are not completely comfortable with the trial court's ruling, because it allows Terry to flout the trial court's orders and forces Donna into a trial without the financial information she sought and was entitled to, after review of the record and considering the result reached, we cannot say the denial of the continuance was an abuse of discretion. We

reach this conclusion for three reasons: first, Donna's failure to timely invoke the trial court's powers to enforce the discovery which had been ordered; second, the trial court's deviation from the child support guidelines, awarding Donna substantial child support at a level that she may not have received even had she gained access to the financial records of Terry's various entities, which records he was clearly intent on hiding; and third, the fact that child support is not final, meaning that Donna is not precluded from another effort to increase the support.

In reaching our decision to uphold the denial of the continuance, we find it significant that by our calculation, to produce a monthly child support obligation for one child under the guidelines, given Donna's monthly income of $3,000, the trial court would have to attribute $8,500 monthly income to Terry—or an income of $102,000 per year. In short, while Donna's argument that she should have had the continuance is rather persuasive, given Terry's conduct, we recall that this is an equitable proceeding and we cannot say that the overall result was inequitable. Moreover, we understand and empathize with the trial court's rationale in denying the continuance requested on the morning of trial. Therefore, given all of these considerations, we cannot say that the trial court abused its discretion in denying Donna's requested continuance.

Child Support.

From the above discussion, it is undoubtedly apparent that we cannot say that the trial court abused its discretion in ordering Terry to pay $1,000 per month in child support. See *Henke v. Guerrero*, 13 Neb. App. 337, 692 N.W.2d 762 (2005) (trial court's award of child support in paternity case will not be disturbed on appeal in absence of abuse of discretion by trial court). Our conclusion is based on a number of factors. First, while Donna complains that the award of child support should be more, she did not adduce evidence to support that claim, and while we recognize that Terry failed to produce the financial information he was ordered to produce, the record reveals that the enforcement tools available to Donna were not utilized. Second, Terry has not cross-appealed—a fact which implies that if he had produced the data he was ordered to produce,

such would support the amount of child support ordered by the district court.

However, we do find merit to Donna's claim that the child support order should have been made retroactive to January 1, 2005—the first day of the month following the filing date of Donna's countercomplaint for increased child support. Prior to the trial court's final order of December 11, 2006, setting child support of $1,000 per month effective January 1, 2007, the court had entered a temporary order for child support of $346.76 per month beginning January 1, 2005. But, the earlier support order was merely an interlocutory order from which no appeal could be taken, because final resolution of custody and support had not yet been made. See *Dawes v. Wittrock Sandblasting & Painting*, 266 Neb. 526, 667 N.W.2d 167 (2003) (when multiple issues are presented to trial court for simultaneous disposition in same proceeding and court decides some of those issues, while reserving some issue or issues for later determination, court's determination of less than all those issues is interlocutory order and is not final order for purpose of appeal), *disapproved on other grounds, Kimminau v. Uribe Refuse Serv.*, 270 Neb. 682, 707 N.W.2d 229 (2005). The fact that the initial child support order was interlocutory militates in favor of making the final order retroactive, particularly as here, when the delay between the interlocutory order and the final order was in large part traceable to the difficulty encountered in getting financial records and information from Terry. While we acknowledge that the instant case is not a modification of a previous final support order, the principles of, and reasons for, retroactivity in such proceedings are clearly analogous, and therefore applicable in the present case. See *Riggs v. Riggs*, 261 Neb. 344, 622 N.W.2d 861 (2001) (absent equities to contrary, rule should generally be that modification of child support order should be applied retroactively to first day of month following filing date of application for modification). Clearly, the record reveals no equities in Terry's favor which would prevent retroactive application of the final child support award to the first day of the month following Donna's request. Consequently, we modify the trial court's order to make the child support order of $1,000 per month

retroactive to January 1, 2005, with Terry to receive credit for payments made under the temporary order.

Joint Legal Custody.

[5] Donna argues that the district court erred in awarding joint legal custody to the parties. Neb. Rev. Stat. § 42-364(5) (Cum. Supp. 2006) states:

> After a hearing in open court, the court may place the custody of a minor child with both parents on a shared or joint custody basis when both parents agree to such an arrangement. In that event, each parent shall have equal rights to make decisions in the best interests of the minor child in his or her custody. The court may place a minor child in joint custody after conducting a hearing in open court and specifically finding that joint custody is in the best interests of the minor child regardless of any parental agreement or consent.

We have held that § 42-364(5) applies to joint legal custody determinations. See *Kay v. Ludwig*, 12 Neb. App. 868, 686 N.W.2d 619 (2004).

[6,7] The Nebraska Supreme Court recently held in *Zahl v. Zahl*, 273 Neb. 1043, 736 N.W.2d 365 (2007), that fundamental fairness requires that when a trial court determines at a general custody hearing that joint physical custody is, or may be, in a child's best interests, but neither party has requested this custody arrangement, the court must give the parties an opportunity to present evidence on the issue before imposing joint custody. While *Zahl* was decided in the context of a joint physical custody order, the same considerations of notice—the opportunity to be heard and present evidence on the issue—are equally applicable when the trial court is considering making an award of joint legal custody. In the instant case, by ordering joint legal custody, which neither party requested, the trial court made a finding that the parties are capable of communicating and working together effectively without harmful rancor affecting Parker as they make major decisions for him, for example, schooling and religious training. For these reasons, we find that the holding in *Zahl, supra*, extends to joint legal custody, and therefore requires that the court must give the parties an opportunity

to present evidence on the issue of joint legal custody before imposing such.

However, we note that Terry does not cross-appeal the trial court's award of physical custody to Donna, and the record reflects that she is the appropriate custodial parent. Thus, we affirm such award, and our remand goes only to whether granting joint legal custody is in the best interests of Parker or whether Donna should have legal custody as well.

Attorney Fees.

Donna argues that the district court erred in not awarding her attorney fees. In denying Donna's request for attorney fees, the district court reasoned:

> [B]oth parties are self-sufficient adults, [both] of them have their own separate families, the case only involved less than a one-day trial, extensive discovery was not conducted because there were no financial records available to discover, and Donna did not request attorney fees in her answer or counterclaim.

Donna's counsel testified that his fee is $150 per hour and that such fee is fair and reasonable. Counsel testified that this case was complex due to the lack of financial information provided by Terry and that thus, the attorney fees incurred by Donna total $8,290.75, which includes 3 hours for trial. Donna's counsel conceded that his bill does not set out the time spent on individual items of service. And, on cross-examination, he admitted that there might be a mistake on the bill, because the bill shows two motions to compel in a 4-day period and he probably would not have drafted two motions in a 4-day span. Counsel also said that a paralegal may have been involved, although the billing statement does not show paralegal charges.

While the billing statement was received into evidence, it has the above-noted shortcomings. Moreover, each page of the statement shows work done on several different days, with the total amount charged listed at the bottom of the page—without specifying which portion of the charges went for what work. For example, we reproduce a portion of the billing statement as follows:

		PREVIOUS BALANCE	$690.00
		FEES	
10/03/2006	JLH	Prepared letter to Donna with copy of Order to Show Cause	
10/11/2006	JLH	Call with Donna.	
10/12/2006	JLH	Reviewed e-mail from Donna.	
	JLH	Prepared e-mail to Donna.	
10/13/2006	JLH	Prepared Affidavit. Attended hearing to keep case alive.	
10/17/2006	JLH	Prepared letter to Donna with copy of Order; Reviewed Order	
		FOR CURRENT SERVICES RENDERED	240.00
		PAYMENTS	
10/18/2006		PAYMENT - THANK YOU	–700.00
		BALANCE DUE	$230.00

Without an accurate accounting of time spent on the various aspects of the services recorded, the trial judge could not have known whether the attorney fees were reasonable, especially in light of counsel's admission to mistakes in the bill, as well as the fact that counsel did not have to deal with financial records from Terry's various business entities, given that such were not produced. Thus, for a number of reasons, we cannot say after our de novo review of the record that the district court abused its discretion in failing to award Donna attorney fees. See *Morrill County v. Darsaklis*, 7 Neb. App. 489, 584 N.W.2d 36 (1998) (in paternity action, attorney fees are reviewed de novo on record to determine whether there has been abuse of discretion by trial judge; absent such abuse, award will be affirmed).

CONCLUSION

For the reasons stated above, we find that the district court did not abuse its discretion in denying Donna's motion to continue. We further find that the district court's order that Terry pay $1,000 per month in child support was not an abuse of discretion. However, we find that the child support order should be retroactive to January 1, 2005, and we modify the district court's order accordingly.

We find that the district court abused its discretion in awarding the parties joint legal custody of Parker without having the

appropriate hearing as required by § 42-364(5) and *Zahl v. Zahl*, 273 Neb. 1043, 736 N.W.2d 365 (2007). We therefore reverse, and remand the cause for further proceedings on this issue, consistent with our opinion.

Finally, we find that the district court did not abuse its discretion in failing to award Donna attorney fees. We affirm this portion of the district court's order.

AFFIRMED IN PART AS MODIFIED, AND IN PART REVERSED AND REMANDED FOR FURTHER PROCEEDINGS.

IN RE INTEREST OF A.W. ET AL., CHILDREN UNDER 18 YEARS OF AGE. STATE OF NEBRASKA, APPELLEE, V. DANIEL V., APPELLANT.

742 N.W.2d 250

Filed November 27, 2007. No. A-07-270.

1. **Judgments: Jurisdiction: Appeal and Error.** When a jurisdictional question does not involve a factual dispute, its determination is a matter of law, which requires an appellate court to reach a conclusion independent from the decision made by the lower courts.
2. **Juvenile Courts: Evidence: Appeal and Error.** Juvenile cases are reviewed de novo on the record, and an appellate court is required to reach a conclusion independent of the juvenile court's findings. When the evidence is in conflict, however, an appellate court may give weight to the fact that the lower court observed the witnesses and accepted one version of the facts over the other.
3. **Juvenile Courts: Jurisdiction: Appeal and Error.** In a juvenile case, as in any other appeal, before reaching the legal issues presented for review, it is the duty of an appellate court to determine whether it has jurisdiction over the matter before it.
4. **Juvenile Courts: Parental Rights: Final Orders: Appeal and Error.** A judicial determination made following an adjudication in a special proceeding which affects the substantial right of parents to raise their children is a final, appealable order.
5. **Juvenile Courts: Final Orders: Time: Appeal and Error.** In juvenile cases, where an order from a juvenile court is already in place and a subsequent order merely extends the time for which the previous order is applicable, the subsequent order by itself does not affect a substantial right and does not extend the time in which the original order may be appealed.
6. **Juvenile Courts: Parental Rights: Visitation: Final Orders.** An order terminating visitation is a final order.
7. **Juvenile Courts: Parental Rights.** The question of whether a substantial right of a parent has been affected by an order in juvenile court litigation is dependent upon both the

object of the order and the length of time over which the parent's relationship with the juvenile may reasonably be expected to be disturbed.

8. **Juvenile Courts: Parental Rights: Proof.** In order for a court to disapprove of a plan proposed by the Department of Health and Human Services, a party must prove by a preponderance of the evidence that the department's plan is not in the child's best interests.
9. **Parental Rights.** A parent's incarceration is a factor to consider in determining whether or not a rehabilitation plan should be adopted for that parent.

Appeal from the County Court for Madison County: ROSS A. STOFFER, Judge. Affirmed.

Courtney Klein-Faust and Ronald E. Temple, of Fitzgerald, Vetter & Temple, for appellant.

Gail Collins, Deputy Madison County Attorney, for appellee.

David Uher, guardian ad litem.

INBODY, Chief Judge, and IRWIN and MOORE, Judges.

MOORE, Judge.

INTRODUCTION

Daniel V., natural father of D.V. and J.V., appeals from the order entered by the county court for Madison County, sitting as a juvenile court, approving the case plan and court report and overruling Daniel's objection to said report. Although we conclude that the order did affect a substantial right, we nevertheless affirm the order of the lower court.

BACKGROUND

Daniel and his wife, Shelly V., are the natural parents to D.V. (born February 3, 2003) and J.V. (born February 6, 2004), who are the children at issue in connection with this appeal. Shelly is also the natural mother of A.W. and R.W., who are not involved in the instant appeal. An order was entered on March 16, 2007, terminating Shelly's parental rights to all four children, which order was affirmed by this court in a memorandum opinion filed October 26, 2007, in case No. A-07-361.

The children were removed from the home of Daniel and Shelly on February 24, 2005, because drug paraphernalia and methamphetamine were found in the family home, in addition

to the poor condition of the home. Following a no contest plea by the parents, all four children were adjudicated under Neb. Rev. Stat. § 43-247(3)(a) (Reissue 2004) on July 25. The children have been in the legal custody of the Department of Health and Human Services (DHHS) since their removal from the home and have been placed in foster care. At the October 31 disposition hearing, the case plan and court report prepared September 20, which had reunification as the permanency objective, was approved. Among other things, Daniel was ordered to refrain from using drugs, to submit to random drug testing, and to pursue intensive inpatient treatment. The visitation plan in this court report provided for visits two to four times per week, for 2 to 6 hours each visit.

A review hearing was held on May 23, 2006, at which time an April 21 case plan and court report was approved. The permanency objective at this time remained reunification; however, there was a concurrent plan of adoption. The report indicated that Daniel had entered a treatment program on November 7, 2005, but left the program shortly thereafter. The report further indicated that on March 3, 2006, Daniel pled guilty to felony drug possession and misdemeanor child abuse and that he was awaiting sentencing. Daniel entered an intensive inpatient program in Omaha on April 15. Daniel's visitation plan provided for at least one visit per month for 1 hour and provided for weekly contact following his release from treatment.

The next case plan and court report was prepared on December 19, 2006. This report indicated that Daniel had been sentenced on June 5 to 16 to 28 months' incarceration on the child abuse conviction and 1 year's incarceration on the drug possession conviction, to be served consecutively. The report stated that Daniel was expected to be released from incarceration in August or September 2007. The visitation plan stated that D.V. and J.V. were transported to the Omaha Correctional Center every other month for up to 2 hours. The permanency plan remained reunification with a concurrent plan of adoption.

On January 16, 2007, Daniel filed an "Objection to Case Plan," wherein he alleged that the plan was not an accurate reflection of the progress he had made and that the visitation

plan for Daniel was not in the best interests of the children. Daniel asked that the case plan not be accepted or, in the alternative, that it be amended to reflect his progress and that he be given bimonthly visitation. The State filed a motion to terminate Daniel's parental rights on January 29.

A hearing was held on Daniel's objection to the case plan and court report on February 8 and 9, 2007. Kari Kraenow, a protection and safety worker with DHHS, testified that the children had been visiting Daniel every other month, which visits required a 4-hour automobile trip each way between the children's foster home in O'Neill and the correctional facility in Omaha. Three visits had taken place between the time of Daniel's incarceration and the hearing. The children generally left O'Neill about 9 a.m. and returned to O'Neill about 7:30 p.m. At the time of the hearing, D.V. had just turned 4 and J.V. had just turned 3. The visits were generally appropriate, with the children excited to see their father. However, the visits did not usually last 2 hours, because the children became restless after approximately 45 minutes. Kraenow testified that due to the rules of the correctional facility, there were not a lot of activities that the children and Daniel could participate in, other than reading books. Kraenow initially intended for visits to be once a month but decided after the first visit that it was not in the children's best interests, due to the facility rules which did not promote positive interaction between children and parents. Kraenow determined that visitation every other month was appropriate, and she testified that it would not be in the children's best interests to increase the frequency of visitation while Daniel was incarcerated.

Kraenow also testified regarding Daniel's drug treatment. She indicated that Daniel was placed at the treatment facility in Omaha in April 2006, but he did not actually begin the program until May 17, and that he left the program at the time he was sentenced. Kraenow did not have any current information about programs Daniel had been involved in since his incarceration, nor had she seen any of his recent drug test results.

Daniel testified that he had completed parenting classes, as well as phase I of a drug treatment program. He was

also attending weekly Narcotics Anonymous and Alcoholics Anonymous meetings. He is currently involved in phase II of the drug treatment program, attending daily sessions. Daniel had plans to be finished with phase III of the program by September 2007. Daniel testified that he submits to regular, random drug tests which have all been negative and that he has not used drugs since he entered the Omaha treatment facility in May 2006. Daniel is also taking classes through the GED program. Daniel testified that his "jam," or release, date is January 2008.

At the conclusion of the hearing, the court overruled Daniel's objection to the case plan and court report, finding that Daniel failed to show by a preponderance of the evidence that the visitation plan was not in the children's best interests. The court adopted the case plan and court report. The court entered a written order on February 9, 2007, which reflected the above decision. The order also noted that the State withdrew its motion to terminate Daniel's parental rights. Daniel appeals from the February 9 order.

ASSIGNMENT OF ERROR

Daniel asserts that the trial court erred in accepting the case plan and court report over his objection, which report he argues limited his visitation with the children to once every 2 months and omitted information about his drug and alcohol treatment.

STANDARD OF REVIEW

[1] When a jurisdictional question does not involve a factual dispute, its determination is a matter of law, which requires an appellate court to reach a conclusion independent from the decision made by the lower courts. *In re Guardianship of Rebecca B. et al.*, 260 Neb. 922, 621 N.W.2d 289 (2000).

[2] Juvenile cases are reviewed de novo on the record, and an appellate court is required to reach a conclusion independent of the juvenile court's findings. When the evidence is in conflict, however, an appellate court may give weight to the fact that the lower court observed the witnesses and accepted one version of the facts over the other. *In re Interest of B.R. et al.*, 270 Neb. 685, 708 N.W.2d 586 (2005).

ANALYSIS

Jurisdiction.

Daniel appeals from the dispositional order of February 9, 2007, wherein the trial court overruled his objection and adopted the case plan and court report dated December 19, 2006. The State argues that this order was not a final, appealable order because it did not affect a substantial right of Daniel.

[3-5] In a juvenile case, as in any other appeal, before reaching the legal issues presented for review, it is the duty of an appellate court to determine whether it has jurisdiction over the matter before it. *In re Interest of Dakota L. et al.*, 14 Neb. App. 559, 712 N.W.2d 583 (2006). It is well settled that a judicial determination made following an adjudication in a special proceeding which affects the substantial right of parents to raise their children is a final, appealable order. *In re Guardianship of Rebecca B. et al., supra*; *In re Interest of Clifford M. et al.*, 258 Neb. 800, 606 N.W.2d 743 (2000). However, in juvenile cases, where an order from a juvenile court is already in place and a subsequent order merely extends the time for which the previous order is applicable, the subsequent order by itself does not affect a substantial right and does not extend the time in which the original order may be appealed. *In re Guardianship of Rebecca B. et al., supra*. Accordingly, to determine whether the review order can be appealed in this case, it is necessary to consider the nature of the court's order on February 9, 2007, and what parental rights, if any, were affected by that order.

Daniel asserts that the case plan and court report that was adopted at the February 9, 2007, hearing changed his visitation with his children from once a month to once every other month, which limitation on visitation affected a substantial right. In reviewing the case plan and court reports in the record, Daniel's visitation started out with two to four visits per week, from 2 to 6 hours each visit; then was reduced to once a month; and finally, was reduced to once every other month. Thus, at least with respect to visitation, there was a change in the plan between the previous dispositional orders and the order entered on February 9.

[6] This court has recognized that a no contact order or a no visitation order can significantly impact parental rights and that a no visitation order can affect a substantial right. See *In re Interest of B.J.M. et al.*, 1 Neb. App. 851, 510 N.W.2d 418 (1993). We have also held that an order terminating visitation is a final order. *In re Interest of Zachary L.*, 4 Neb. App. 324, 543 N.W.2d 211 (1996). While the order in question did not completely eliminate or terminate visitation, it did reduce Daniel's visitation in such a way that it significantly impacted his parental right.

[7] The question of whether a substantial right of a parent has been affected by an order in juvenile court litigation is dependent upon both the object of the order and the length of time over which the parent's relationship with the juvenile may reasonably be expected to be disturbed. *In re Guardianship of Sophia M.*, 271 Neb. 133, 710 N.W.2d 312 (2006); *In re Interest of Zachary W. & Alyssa W.*, 3 Neb. App. 274, 526 N.W.2d 233 (1994). At the time the order in question was entered, February 9, 2007, Daniel was going to be incarcerated for nearly another year.

We conclude that the February 9, 2007, order is of sufficient importance and may reasonably be expected to last a sufficiently long period of time that the order affects a substantial right of Daniel, and hence, it is appealable.

Approval of Plan.

Daniel contends that the lower court erred in approving the case plan and court report over his objection, which report he argues limited his visitation with the children to once every 2 months and omitted information about his drug and alcohol treatment. After reviewing the record de novo, we conclude that the juvenile court did not err in adopting DHHS' recommendation with regard to Daniel's visitation with the children.

[8] While Neb. Rev. Stat. § 43-285 (Reissue 2004) grants a juvenile court discretionary power over a recommendation proposed by DHHS, it also grants preference in favor of such proposal. In order for a court to disapprove of a plan proposed by DHHS, a party must prove by a preponderance of the evidence that DHHS' plan is not in the child's best interests. *In re*

Interest of Tabatha R., 255 Neb. 818, 587 N.W.2d 109 (1998). See § 43-285.

[9] The evidence at the review hearing shows that Daniel's visitation was reduced because of his incarceration and the attendant circumstances of the incarceration, including the lengthy travel required of the children to visit Daniel at the correctional facility and the inability to have positive, meaningful interaction between Daniel and the children while at the facility. The Nebraska Supreme Court has recognized that a parent's incarceration is a factor to consider in determining whether or not a rehabilitation plan should be adopted for that parent. *In re Interest of Tabatha R., supra*.

We conclude that Daniel failed to establish that DHHS' proposal with respect to visitation was not in the children's best interests. Accordingly, we affirm the decision of the lower court adopting the case plan and court report and overruling Daniel's objection.

AFFIRMED.

BRIAN THOMAS BECKMAN, APPELLANT, V.
CHRISTINA JOY MCANDREW, APPELLEE.

742 N.W.2d 778

Filed December 4, 2007. No. A-06-910.

1. **Judgments: Jurisdiction: Appeal and Error.** When a jurisdictional question does not involve a factual dispute, determination of the issue is a matter of law, which requires an appellate court to reach a conclusion independent from the trial court.
2. **Jurisdiction: Appeal and Error.** Before reaching the legal issues presented for review, it is the duty of an appellate court to determine whether it has jurisdiction over the matter before it.
3. ____: ____. Notwithstanding whether the parties raise the issue of jurisdiction, an appellate court has a duty to raise and determine the issue of jurisdiction sua sponte.
4. **Pleadings: Judgments.** A postjudgment motion must be reviewed based on the relief sought by the motion, not based on the title of the motion.
5. ____: ____. When the statutory basis for a motion challenging a judgment on the merits is unclear, the motion may be treated as a motion to alter or amend the judgment.

6. ____: ____. A determination as to whether a motion, however titled, should be deemed a motion to alter or amend a judgment depends upon the contents of the motion, not its title.
7. **Pleadings: Judgments: Time.** In order to qualify for treatment as a motion to alter or amend the judgment, the motion must be filed no later than 10 days after the entry of judgment, as required under Neb. Rev. Stat. § 25-1329 (Cum. Supp. 2006), and must seek substantive alteration of the judgment.
8. **Pleadings: Judgments.** If a motion seeks substantive alteration of a judgment, as opposed to the correction of clerical errors or relief wholly collateral to the judgment, a court may treat the motion as one to alter or amend the judgment.

Appeal from the District Court for Douglas County: JOHN D. HARTIGAN, JR., Judge. Appeal dismissed.

Christopher A. Vacanti, of Cohen, Vacanti, Higgins & Shattuck, for appellant.

Robert E. O'Connor, Jr., for appellee.

INBODY, Chief Judge, and IRWIN and MOORE, Judges.

MOORE, Judge.

INTRODUCTION

Brian Thomas Beckman appeals from an order of the district court for Douglas County modifying a decree of paternity with respect to visitation and other matters. Following entry of the order, Beckman filed a motion to dismiss with the district court, claiming that the district court no longer had jurisdiction under the Uniform Child Custody Jurisdiction and Enforcement Act (UCCJEA), specifically Neb. Rev. Stat. § 43-1239(a)(2) (Reissue 2004). We conclude that the motion to dismiss was a tolling motion under Neb. Rev. Stat. § 25-1912(3) (Cum. Supp. 2006) and that because a ruling on the motion was not announced prior to the filing of the notice of appeal, the notice of appeal was of no effect and we do not have jurisdiction to hear this appeal.

BACKGROUND

Beckman and Christina Joy McAndrew are the parents of a child born October 16, 2000. A paternity decree was entered on February 6, 2002, which awarded custody of the child to

McAndrew and set Beckman's visitation rights. At the time of the decree, Beckman was residing in Colorado and McAndrew and the child were residing in Omaha, Nebraska. On December 24, 2003, an order of modification was entered which granted McAndrew permission to remove the child from Nebraska to Kansas and altered the visitation provisions. On September 6, 2005, Beckman filed a complaint for modification in the district court for Douglas County, again requesting a modification of the visitation provisions. McAndrew filed an answer and counterclaim wherein she denied a material change in circumstances as alleged by Beckman, but McAndrew requested other modifications in the event the court decided to modify the decree. At the time the complaint for modification was filed, Beckman was still residing in Colorado and McAndrew and the child were residing in Kansas. Beckman alleged in his complaint that the court had jurisdiction over the subject matter and parties.

A trial on Beckman's application was held in the district court on July 12, 2006, at which time both parties presented evidence. On July 18, an order was entered which modified the decree in various respects. In the order, the district court noted that "[t]he Court has full and complete jurisdiction over the subject matter of this action, and the parties to this proceeding." On July 19, Beckman filed a motion to dismiss in the district court, asserting for the first time that the district court lacked subject matter jurisdiction under the UCCJEA, specifically Neb. Rev. Stat. § 43-1238 (Reissue 2004) and § 43-1239, and citing to *Paulsen v. Paulsen*, 11 Neb. App. 582, 658 N.W.2d 49 (2003). Beckman alleged that because neither party has resided in Nebraska since June 2003, the exercise of continuing jurisdiction was improper and the court should dismiss the action. On August 15, a hearing was held on the motion to dismiss, at which time the court heard arguments. We have no record of any announcement by the court of a decision on August 15. In an order entered on August 23, the court noted that Beckman had also filed a notice of appeal on August 15, divesting the court of jurisdiction to take further action pending resolution of the appeal. Nevertheless, the district court denied the motion to dismiss. Beckman appeals from the order of modification entered July 18.

ASSIGNMENTS OF ERROR

Beckman assigns error to the district court's finding that a material change of circumstances existed warranting a reduction of Beckman's parenting time rights with the child. Beckman also assigns error to the district court's failure to find that it lacked subject matter jurisdiction to modify the decree.

STANDARD OF REVIEW

[1] When a jurisdictional question does not involve a factual dispute, determination of the issue is a matter of law, which requires an appellate court to reach a conclusion independent from the trial court. *Watson v. Watson*, 272 Neb. 647, 724 N.W.2d 24 (2006).

ANALYSIS

[2,3] Before reaching the legal issues presented for review, it is the duty of an appellate court to determine whether it has jurisdiction over the matter before it. *Waite v. City of Omaha*, 263 Neb. 589, 641 N.W.2d 351 (2002); *State v. Blair*, 14 Neb. App. 190, 707 N.W.2d 8 (2005). Notwithstanding whether the parties raise the issue of jurisdiction, an appellate court has a duty to raise and determine the issue of jurisdiction sua sponte. *Waite, supra*.

[4-8] We must first examine the effect of Beckman's filing of the motion to dismiss; specifically whether it is a tolling motion contemplated by Neb. Rev. Stat. § 25-1912(3) (Cum. Supp. 2006). A postjudgment motion must be reviewed based on the relief sought by the motion, not based on the title of the motion. *Woodhouse Ford v. Laflan*, 268 Neb. 722, 687 N.W.2d 672 (2004). See *Weeder v. Central Comm. College*, 269 Neb. 114, 691 N.W.2d 508 (2005). When the statutory basis for a motion challenging a judgment on the merits is unclear, the motion may be treated as a motion to alter or amend the judgment. See *Woodhouse Ford, supra*. A determination as to whether a motion, however titled, should be deemed a motion to alter or amend a judgment depends upon the contents of the motion, not its title. *State v. Bellamy*, 264 Neb. 784, 652 N.W.2d 86 (2002); *Vesely v. National Travelers Life Co.*, 12 Neb. App. 622, 682 N.W.2d 713 (2004); *Lee Sapp Leasing v. Ciao Caffe*

& Espresso, Inc., 10 Neb. App. 948, 640 N.W.2d 677 (2002). In order to qualify for treatment as a motion to alter or amend the judgment, the motion must be filed no later than 10 days after the entry of judgment, as required under Neb. Rev. Stat. § 25-1329 (Cum. Supp. 2006), and must seek substantive alteration of the judgment. *Weeder v. Central Comm. College, supra*; *State v. Bellamy, supra*. If a motion seeks substantive alteration of a judgment, as opposed to the correction of clerical errors or relief wholly collateral to the judgment, a court may treat the motion as one to alter or amend the judgment. *Strong v. Omaha Constr. Indus. Pension Plan*, 270 Neb. 1, 701 N.W.2d 320 (2005).

Following the above principles, the Nebraska Supreme Court and this court have treated a variety of postjudgment motions as motions to alter or amend. There are several cases wherein a motion for new trial has been treated as a motion to alter or amend. See, *id.*; *Allied Mut. Ins. Co. v. City of Lincoln*, 269 Neb. 631, 694 N.W.2d 832 (2005); *Weeder v. Central Comm. College, supra*; *Diversified Telecom Servs. v. Clevinger*, 268 Neb. 388, 683 N.W.2d 338 (2004); *Central Neb. Pub. Power v. Jeffrey Lake Dev.*, 267 Neb. 997, 679 N.W.2d 235 (2004). The Supreme Court has also stated that a motion for reconsideration is the functional equivalent of a motion to alter or amend a judgment. See, *Strong v. Omaha Constr. Indus. Pension Plan, supra*; *Allied Mut. Ins. Co. v. City of Lincoln, supra*; *Woodhouse Ford v. Laflan, supra*. In *Debose v. State*, 267 Neb. 116, 672 N.W.2d 426 (2003), the court found that the plaintiffs' motion, which was filed after dismissal of their action on statute of limitations grounds and which requested reinstatement of their action, was properly characterized as a motion to alter or amend a judgment.

We conclude that Beckman's motion to dismiss in this case should be treated as a motion to alter or amend because it asks for vacation of the July 18, 2006, order and dismissal of the action. At the time Beckman's notice of appeal was filed on August 15, there had been no announcement by the court or order entered with regard to the motion to dismiss. Therefore, under § 25-1912(3), the notice of appeal filed on August 15 was of no effect. No new notice of appeal was filed from the order

entered on August 23, ruling on the motion to dismiss. Therefore, this court is without jurisdiction to hear this appeal.

APPEAL DISMISSED.

VASILE HURBENCA, APPELLANT, V. NEBRASKA DEPARTMENT OF CORRECTIONAL SERVICES, APPELLEE.

742 N.W.2d 773

Filed December 4, 2007. No. A-06-945.

1. **Statutes: Appeal and Error.** Interpretation of a statute presents a question of law, in connection with which an appellate court has an obligation to reach an independent conclusion irrespective of the decision made by the court below.
2. **Sentences: Time: Prisoners.** The chief executive officer of a correctional facility shall reduce the term of a committed offender by 6 months for each year of the offender's term and pro rata for any part thereof which is less than a year.
3. ____: ____: ____. The total of term reductions shall be credited from the date of sentence, which shall include any term of confinement prior to sentence and commitment as provided pursuant to Neb. Rev. Stat. § 83-1,106 (Reissue 1987), and shall be deducted (1) from the minimum term, to determine the date of eligibility for release on parole, and (2) from the maximum term, to determine the date when discharge from the custody of the state becomes mandatory.
4. **Statutes.** A statute is open for construction only when the language used requires interpretation or may reasonably be considered ambiguous.
5. ____. A statute is ambiguous when the language used cannot be adequately understood either from the plain meaning of the statute or when considered in pari materia with any related statutes.
6. **Habitual Criminals: Sentences: Probation and Parole: Time.** It is undisputed that a habitual criminal sentenced under Neb. Rev. Stat. § 29-2221 (Reissue 1995) may not be released on parole until the individual has served the mandatory minimum sentence of 10 years' imprisonment.
7. **Sentences: Time: Prisoners.** The fact that Neb. Rev. Stat. § 83-1,107 (Reissue 1994) does not address whether good time may be applied to the maximum term of the sentence when the mandatory minimum and the maximum term are the same number of years gives rise to an ambiguity.
8. **Probation and Parole: Time.** The Board of Parole shall reduce, for good conduct in conformity with the conditions of parole, a parolee's parole term by 2 days for each month of such term.
9. **Sentences: Probation and Parole: Time.** The total of reductions for good conduct shall be deducted from the maximum term, less good time granted pursuant to Neb. Rev. Stat. § 83-1,107 (Reissue 1994), to determine the date when discharge from parole becomes mandatory.

10. **Probation and Parole: Time.** Reductions of the parole terms may be forfeited, withheld, and restored by the Board of Parole after the parolee has been consulted regarding any charge of misconduct or breach of the conditions of parole.
11. **Habitual Criminals: Sentences: Time.** Neb. Rev. Stat. § 83-1,108 (Reissue 1987) is ambiguous when compared in pari materia to Neb. Rev. Stat. § 29-2221 (Reissue 1995), the habitual criminal statue requiring a mandatory minimum prison sentence of 10 years, because it makes no mention of mandatory minimum sentences, and therefore gives no instruction on whether good time should be applied against the maximum sentence before the mandatory minimum sentence is served.

Appeal from the District Court for Johnson County: DANIEL BRYAN, JR., Judge. Affirmed.

Vasile Hurbenca, pro se.

Jon Bruning, Attorney General, and Stephanie A. Caldwell for appellee.

SIEVERS, CARLSON, and CASSEL, Judges.

SIEVERS, Judge.

Appellant argues in this appeal that the computation of his prison sentence was incorrect because his mandatory minimum sentence of 10 years under Neb. Rev. Stat. § 29-2221 (Reissue 1995) should have been reduced for "good time" pursuant to Neb. Rev. Stat. § 83-1,108 (Reissue 1987). We have directed that the appeal be submitted without oral argument under Neb. Ct. R. of Prac. 11 (rev. 2006).

FACTUAL AND PROCEDURAL BACKGROUND

On September 25, 1986, Vasile Hurbenca was sentenced in Douglas County to 6 to 20 years' imprisonment for theft and 4 years' imprisonment for attempting to procure fraudulent title, sentences to be served consecutively. This resulted in a total term of 6 to 24 years' imprisonment.

On December 8, 1987, Hurbenca was sentenced in Lancaster County for attempted escape and received a consecutive sentence of 1 year's imprisonment. This made his sentence a total term of 6 to 25 years' imprisonment.

On December 10, 1991, Hurbenca was sentenced in Douglas County for false application for a motor vehicle and received a sentence consecutive to others recounted above of 1 year 7 months'

to 5 years' imprisonment. This resulted in a total term of 7 years 7 months' to 30 years' imprisonment.

On February 23, 1996, Hurbenca was sentenced in Douglas County for possession of a deadly weapon by a felon and received a sentence consecutive to others recounted above of 10 to 15 years' imprisonment under the habitual criminal statute, § 29-2221. This resulted in a total term of 17 years 7 months' to 45 years' imprisonment.

On September 17, 2002, Hurbenca was sentenced in Lancaster County for escape and received a sentence of 10 to 15 years' imprisonment under the habitual criminal statute to be served consecutively to his other sentences. This resulted in a total term of 27 years 7 months' to 60 years' imprisonment.

After this last conviction and sentence, the Nebraska Department of Correctional Services (DCS) computed Hurbenca's parole eligibility date to be August 18, 2008, and his discharge date to be May 28, 2019. This was computed by adding the 10-year mandatory minimum sentence to Hurbenca's previous parole eligibility date of August 18, 1998, and to his previous discharge date of May 28, 2009.

On December 5, 2005, Hurbenca filed an action in the district court for Johnson County pursuant to Neb. Rev. Stat. §§ 25-21,149 through 25-21,164 (Reissue 1995 & Cum. Supp. 2006), seeking declaratory relief because DCS had inaccurately calculated his prison sentence. On August 23, 2006, the district court, analyzing Hurbenca's claims using *Johnson v. Kenney*, 265 Neb. 47, 654 N.W.2d 191 (2002), declared that the computation of Hurbenca's parole and discharge dates was correct. Hurbenca timely appealed.

ASSIGNMENTS OF ERROR

Hurbenca assigns, restated, the following errors to the district court: (1) its finding that § 83-1,108 is ambiguous and subject to interpretation and (2) its failing to apply § 83-1,108 to the 10-year mandatory minimum portion of his prison sentence.

STANDARD OF REVIEW

[1] Interpretation of a statute presents a question of law, in connection with which an appellate court has an obligation to reach an independent conclusion irrespective of the decision

made by the court below. *State v. Mather*, 264 Neb. 182, 646 N.W.2d 605 (2002).

ANALYSIS

The issue presented is one of statutory interpretation: whether the good time credit set forth in § 83-1,108 applies to the mandatory minimum sentence imposed upon Hurbenca pursuant to § 29-2221(1). Hurbenca's sentence was properly calculated based on the Supreme Court case of *Johnson v. Kenney, supra*.

[2,3] In *Johnson*, James Johnson had been sentenced under § 29-2221(1), the habitual criminal law, which carries a mandatory minimum sentence of 10 years' imprisonment. The question was whether Neb. Rev. Stat. § 83-1,107 (Reissue 1994), the then applicable "good time" statute, should apply to the mandatory minimum sentence given to Johnson. The relevant portions of § 83-1,107 read as follows:

> (1) The chief executive officer of a facility shall reduce the term of a committed offender by six months for each year of the offender's term and pro rata for any part thereof which is less than a year. The total of all such reductions shall be credited from the date of sentence, which shall include any term of confinement prior to sentence and commitment as provided pursuant to section 83-1,106, and shall be deducted:
>
> (a) From the minimum term, to determine the date of eligibility for release on parole; and
>
> (b) From the maximum term, to determine the date when discharge from the custody of the state becomes mandatory.

[4-7] The Supreme Court found that this statute was ambiguous as to whether it applied to mandatory minimum sentences like Johnson's, stating:

> A statute is open for construction only when the language used requires interpretation or may reasonably be considered ambiguous. . . . A statute is ambiguous when the language used cannot be adequately understood either from the plain meaning of the statute or when considered in pari materia with any related statutes. . . . It is undisputed that a habitual criminal sentenced under § 29-2221 may

> not be released on parole until the individual has served the mandatory minimum sentence of 10 years. The fact that § 83-1,107 does not address whether good time may be applied to the maximum term of the sentence when the mandatory minimum and the maximum term are the same number of years gives rise to the ambiguity.

Johnson v. Kenney, 265 Neb. at 50-51, 654 N.W.2d at 194 (citations omitted).

The Supreme Court then said, "When the relevant statutes are considered in pari materia, the intent of habitual criminal sentencing is thwarted if good time credit is applied to the maximum term of the sentence before the mandatory minimum sentence has been served. The minimum portion of the sentence would have no meaning." *Id.* at 51, 654 N.W.2d at 194.

[8-11] Here our analysis of Hurbenca's sentence and the application of § 83-1,108 is the same as the Supreme Court's analysis in *Johnson v. Kenney*, 265 Neb. 47, 654 N.W.2d 191 (2002). Hurbenca was sentenced to a mandatory minimum of 10 years' imprisonment under § 29-2221, just like Johnson. And although a different "good time" statute was applicable to Hurbenca (§ 83-1,108) than was to Johnson (§ 83-1,107), the following language in § 83-1,108 was also ambiguous:

> (1) The Board of Parole shall reduce for good conduct in conformity with the conditions of his parole, a parolee's parole term by two days for each month of such term. The total of such reductions shall be deducted from his maximum term, less good time reductions granted under the provisions of sections 83-1,107 and 83-1,107.01, to determine the date when his discharge from parole becomes mandatory.
>
> (2) Reductions of the parole terms may be forfeited, withheld, and restored by the Board of Parole after the parolee has been consulted regarding any charge of misconduct or breach of the conditions of his parole.

Section 83-1,108 is ambiguous when compared in pari materia to § 29-2221, the habitual criminal statute requiring a mandatory minimum prison sentence of 10 years, because it makes no mention of mandatory minimum sentences, and therefore gives no instruction on whether "good time" should be applied

against the maximum sentence before the mandatory minimum sentence is served.

The Supreme Court's reasoning in *Johnson, supra*, is applicable here, which is that it would thwart the intent of habitual criminal sentencing if good time credit is applied to the maximum term of the sentence before the mandatory minimum sentence has been served. The minimum portion of the sentence would have no meaning. It is called a "mandatory" sentence for a reason, and the Legislature's language in § 83-1,108 gives no indication that the mandatory nature of the minimum sentence under the habitual criminal statute was to be altered. Therefore, DCS and the trial court correctly calculated Hurbenca's prison sentence, parole eligibility, and mandatory discharge dates under § 29-2221 by not applying "good time credit" under § 83-1,108 before the mandatory minimum sentence was served.

Hurbenca also asserts that the facts in this case are different than the facts in *Johnson, supra*. Hurbenca states that his sentence is a consolidated sentence and that he had received a consecutive sentence while serving his original sentence, while Johnson's sentence was not a consolidated or consecutive sentence. But these distinctions make no difference. That Hurbenca is serving multiple or consecutive sentences whereas Johnson was serving only a single sentence does not affect the issues in this case: whether § 83-1,108 is ambiguous, and if so, whether § 83-1,108 should be applied against the mandatory minimum prison sentence of § 29-2221. Having resolved those issues, and utilizing the precedent of *Johnson*, the differences between Hurbenca's and Johnson's prison sentences do not support a different result in this case than in *Johnson*.

CONCLUSION

We find that § 83-1,108 when compared in pari materia with § 29-2221 is ambiguous and that the Supreme Court's ruling in *Johnson v. Kenney*, 265 Neb. 47, 654 N.W.2d 191 (2002), is applicable in interpreting it. Therefore, DCS and the trial court correctly determined that "good time" credit under § 83-1,108 should not be applied to Hurbenca's prison sentence before he has served the mandatory minimum sentence of 10 years' imprisonment under § 29-2221.

AFFIRMED.

PRESTON REFRIGERATION CO., INC., APPELLEE, V. OMAHA COLD STORAGE TERMINALS, INC., APPELLANT.

742 N.W.2d 782

Filed December 4, 2007. No. A-07-472.

1. **Statutes: Appeal and Error.** Statutory interpretation presents a question of law, in connection with which an appellate court has an obligation to reach an independent conclusion irrespective of the decision made by the court below.
2. **Judgments: Appeal and Error.** In a bench trial of a law action, the trial court's factual findings have the effect of a jury verdict and will not be disturbed on appeal unless clearly wrong.
3. **Forcible Entry and Detainer: Title: Jurisdiction: Dismissal and Nonsuit.** A court cannot determine a question of title in a forcible entry and detainer action if the resolution of the case would require the court to determine a title dispute, in which event it must dismiss the forcible entry and detainer action for lack of jurisdiction.
4. **Contractors and Subcontractors: Mechanics' Liens.** When a contractor has not substantially performed a contract, the contractor is entitled to a construction lien only for the reasonable value of the labor performed and the materials furnished.
5. **Actions: Mechanics' Liens: Debtors and Creditors.** In the absence of some provision to the contrary, the remedy upon a construction lien and the remedy upon the debt are distinct and concurrent and may be pursued at the same time or in succession.
6. **Statutes: Intent.** A statutory construction which restricts or removes a common-law right should not be adopted unless the plain words of the statute compel it.
7. **Actions: Mechanics' Liens: Breach of Contract.** The Nebraska Construction Lien Act does not take away a construction lienholder's common-law right to sue for breach of contract.
8. **Actions: Mechanics' Liens: Foreclosure: Breach of Contract: Damages.** When foreclosing a construction lien, a second cause of action for damages occasioned by breach of the contract can be brought in the same lawsuit.
9. **Limitations of Actions: Liens: Time.** A claimant's lien does not attach and may not be enforced unless, after entering into the contract under which the lien arises and not later than 120 days after his or her final furnishing of services or materials, he or she has recorded a lien.
10. **Actions: Liens.** Objections which go to the validity or existence of a lien or the debt on which it is based may be set up in defense to an action to enforce the lien.
11. **Contracts: Pleadings.** In pleading the performance or occurrence of conditions precedent, it is sufficient to aver generally that all conditions precedent have been performed or have occurred. A denial of performance or occurrence shall be made specifically and with particularity.
12. **Actions: Time: Pleadings.** As a general proposition, noncompliance with time limits that are preconditions to an action is an affirmative defense to be specifically pled.

13. **Contracts: Pleadings.** Matters which seek to avoid a valid contract are affirmative defenses.
14. **Mechanics' Liens: Time: Pleadings: Waiver.** Failure to file a construction lien within 120 days of the last furnishing of services or materials is an affirmative defense which must be pled with particularity, and the failure to do so waives such defense.

Appeal from the District Court for Saline County: VICKY L. JOHNSON, Judge. Affirmed.

Alan J. Mackiewicz for appellant.

Andrew M. DeMarea and Jay E. Heidrick, of Shughart, Thomson & Kilroy, P.C., and Steven J. Reisdorff for appellee.

SIEVERS, CARLSON, and CASSEL, Judges.

SIEVERS, Judge.

This appeal presents the question of whether a lawsuit which seeks foreclosure on a construction lien can also include a separate cause of action for additional damages for breach of contract. Pursuant to the authority granted this court under Neb. Ct. R. of Prac. 11B(1) (rev. 2006), this case has been ordered submitted for decision without oral argument.

FACTUAL BACKGROUND

Given the narrow issues raised by the assignments of error, our factual recitation is limited. The appellee, Preston Refrigeration Co., Inc. (Preston), is a refrigeration contractor located in Kansas City, Kansas, and the appellant, Omaha Cold Storage Terminals, Inc. (Cold Storage), is a Nebraska corporation doing business in Omaha, Nebraska, and other states. Cold Storage owned real estate in rural Saline County, Nebraska, upon which it intended to construct a cold processing storage facility known as the Crete Project. In October 2001, Cold Storage arranged for Preston to produce an electrical design for the Crete Project at a cost of $30,000. In late November 2001, Preston agreed to perform work on eight screw compressors to be used at the Crete Project at a cost of $156,565 and a written contract for such work in such amount was entered into between Preston and Cold Storage. On January 20, 2002, Preston and Cold Storage

entered into a contract whereby Preston would perform all work related to the design and construction of the cooling system at the Crete Project, which, as an adjunct, involved work at another facility in Fort Dodge, Iowa. The amount of the contract was $3,413,800. It appears that the majority of the work performed by Preston was actually performed at Preston's facility in Kansas City. In April 2002, Cold Storage indicated to Preston that the Crete Project would be delayed. Work by Preston on the Crete Project as well as a project in Fort Dodge was stopped for 6 weeks, and work on the Crete Project did not recommence in a substantial way. In January and February 2003, Preston performed some additional work under the general outlines of the contract, which work Preston described as necessary to maintain and preserve the materials being held by Preston at its home office and to protect them from natural deterioration. While Preston did not specifically invoice Cold Storage for this work, its charge therefor was $1,884.80.

Preston's last invoice to Cold Storage was dated August 15, 2002, in the amount of $321,948. On March 7, 2003, Preston filed a construction lien with the register of deeds of Saline County in that amount under Neb. Rev. Stat. § 52-147 (Reissue 2004). Thereafter, in October 2003, Cold Storage substituted collateral for the construction lien, in the form of a cashier's check in the amount of $370,300 deposited with the clerk of the district court for Saline County.

PROCEDURAL HISTORY

Although the transcript in this case contains over 400 pages, including several amendments to the complaint, discovery documents, pretrial filings, and court orders, extensive recitation of the procedural history is not necessary for several reasons. The primary reason is that the case ultimately came on for a bench trial before the district court upon Cold Storage's general denial without any affirmative defenses. The primary issue raised by Cold Storage was whether the lawsuit for foreclosure of a construction lien could also include a cause of action for additional damages for breach of contract. The trial court rejected Cold Storage's claim that the action was limited solely to the foreclosure of the lien. The matter was tried on June 26, 2006,

and on December 27, a decision was rendered by the district court which gave judgment to Preston on its lien for $321,948, as well as $1,884.88 "for work performed under the contract but not invoiced to [Cold Storage] for maintenance of the compressors," for a total judgment of $323,832.88. Preston filed a timely motion for new trial and/or to alter or amend the judgment on the ground that the court had not dealt with the breach of contract damages which were claimed. The court entered its order on March 30, 2007, and amended its previous decision to add an additional $748,428 in damages for lost profits due to Cold Storage's breach of contract between the parties, for a total judgment of $1,072,260.88.

The second reason that we do not extensively discuss the procedural history, or the evidence for that matter, is the limited scope of the assignments of error advanced by Cold Storage.

ASSIGNMENTS OF ERROR

Cold Storage makes five separate assignments of error, but examination of its brief reveals that such have been consolidated and argued as three claims, which are as follows: (1) The trial court did not have subject matter jurisdiction to try any common-law causes of action in this statutory action for foreclosure of a construction lien; (2) Preston did not satisfy its burden of proving that its claim was filed in time to create a lien; and (3) Preston never pled a claim for the labor charges of January and February 2003 in the amount of $1,884.88, and as a result, the trial court committed error in including such amount in its judgment.

STANDARD OF REVIEW

[1,2] Statutory interpretation presents a question of law, in connection with which an appellate court has an obligation to reach an independent conclusion irrespective of the decision made by the court below. *Gage Cty. Bd. v. Nebraska Tax Equal. & Rev. Comm.*, 260 Neb. 750, 619 N.W.2d 451 (2000). In a bench trial of a law action, the trial court's factual findings have the effect of a jury verdict and will not be disturbed on appeal unless clearly wrong. *Par 3, Inc. v. Livingston*, 268 Neb. 636, 686 N.W.2d 369 (2004).

ANALYSIS

May Action Brought to Foreclose Construction Lien Include Cause of Action for Other Damages Arising Out of Breach of Contract?

At the outset, we note that the amount sought in conjunction with the foreclosure of Preston's construction lien—$321,948—is not disputed, except as to whether the construction lien was timely perfected. In short, Cold Storage does not contest that the amount sought was fair, reasonable, and necessary, or that the work was not performed. Likewise, Cold Storage does not dispute the amount of $748,428 awarded to Preston as lost profits for unperformed work by virtue of breach of contract by Cold Storage. Rather, Cold Storage's claim is that a breach of contract cause of action for lost profits cannot be brought in this lawsuit. That argument is premised upon *Cummins Mgmt. v. Gilroy*, 266 Neb. 635, 667 N.W.2d 538 (2003). In that case, to secure a note, John M. Gilroy and Cynthia H. Gilroy had delivered a trust deed to Cummins Management, L.P., encumbering property owned by the Gilroys, and after a failure of payments on the note, a trustee's sale was conducted at which Frank L. Huber submitted the high bid. The trustee delivered a deed to Huber, but the Gilroys refused to surrender the property and instead filed an action seeking to set aside the trustee's sale. Shortly thereafter, Huber filed a petition for forcible entry and detainer against the Gilroys, who demurred to such petition claiming that the court lacked subject matter jurisdiction because there was a dispute over who had title to the property. The trial court treated the demurrer as a plea in abatement and suspended the forcible entry and detainer action until determination of the action to set aside the trustee's deed—which the trial court decided against the Gilroys. The Nebraska Supreme Court affirmed the trial court's action in refusing to set aside the trustee's sale in *Gilroy v. Ryberg*, 266 Neb. 617, 667 N.W.2d 544 (2003). However, after refusing to set aside the trustee's deed, the trial court reopened the forcible entry and detainer action and found for Huber's successor in interest, Cummins Management. The Gilroys appealed such decision, claiming that the trial court erred in failing to dismiss because

it lacked subject matter jurisdiction and Cummins Management lacked standing to maintain the action.

[3] The Supreme Court in *Cummins Mgmt.* concluded that the district court had erred in failing to dismiss the action for lack of subject matter jurisdiction and that any order entered after the court determined that title was in dispute was a nullity. The Supreme Court said that for over a century, it had held that a court cannot determine a question of title in a forcible entry and detainer action if the resolution of the case would require the court to determine a title dispute, in which event it must dismiss the forcible entry and detainer action for lack of jurisdiction. The Supreme Court reasoned in *Cummins Mgmt.* that when a party attempts to interject a title dispute into a forcible entry and detainer action, a statutory action, thereby transforming it into an equitable action to determine title, the court is divested of jurisdiction. Citing *Pence v. Uhl*, 11 Neb. 320, 9 N.W. 40 (1881), the court noted the nature of forcible entry and detainer actions, saying that such have nothing to do with title because when titles are relied upon to establish the right to possess real estate, resort must be had to another tribunal but also to a different form of action. Relying upon the limited scope of forcible entry and detainer actions, the Supreme Court in *Cummins Mgmt.* said that when a district court hears such an action, it sits as a special statutory tribunal to summarily decide the issues authorized by the statute and not as a court of general jurisdiction with power to hear and determine other issues.

From this authority and reasoning, Cold Storage argues that a construction lien foreclosure is a statutory action under Neb. Rev. Stat. § 52-125 et seq. (Reissue 2004) and that thus, a common law action for breach of contract cannot be combined therewith. Cold Storage then cites *Tilt-Up Concrete v. Star City/Federal*, 261 Neb. 64, 621 N.W.2d 502 (2001) (*Tilt-Up II*), as precedent and illustrative of its proposition. However, both the district court in the instant action and Preston in its briefing rely upon *Tilt-Up II* as the authority which allows the foreclosure of the construction lien as well as a breach of contract claim in the same action.

[4] In *Tilt-Up Concrete v. Star City/Federal*, 255 Neb. 138, 582 N.W.2d 604 (1998) (*Tilt-Up I*), Tilt-Up Concrete, Inc. (Tilt-Up), filed a petition in district court against Star City/Federal, Inc. (Star City), seeking foreclosure of a construction lien. On appeal, the Supreme Court held that when a contractor has not substantially performed a contract, the contractor is entitled to a construction lien only for the reasonable value of the labor performed and the materials furnished. Thus, the court reduced Tilt-Up's lien by over $600,000.

Four years six months after *Tilt-Up I* was originally filed, Tilt-Up filed another petition in district court seeking damages for breach of an oral contract with Star City and a deficiency judgment, which case became the previously referenced *Tilt-Up II*. Star City's demurrer on the ground that Tilt-Up's second action was barred by the statute of limitations was sustained, and ultimately, Tilt-Up stood on its amended pleading and appealed to the Supreme Court. In the Supreme Court's analysis, it found that on its face, Tilt-Up's second action was barred by the statute of limitations. However, Tilt-Up argued that the statute of limitations was equitably tolled during the pendency of the construction lien foreclosure action because Tilt-Up was barred during that time from bringing a breach of contract action.

[5-7] In reference to Tilt-Up's argument for equitable tolling, the Supreme Court in *Tilt-Up II* considered the effect of the Nebraska Construction Lien Act (NCLA), § 52-125 et seq., saying, "The first issue we address is whether the NCLA precludes a construction lienholder from also pursuing an action for breach of contract." 261 Neb. at 68, 621 N.W.2d at 507. The court said that the general rule is long established that in the absence of some provision to the contrary, the remedy upon a construction lien and the remedy upon the debt are distinct and concurrent and may be pursued "'at the same time or in succession.'" *Id.* In support thereof, the court cited at least 20 cases supporting that proposition from other jurisdictions. The court then held:

> This rule is consistent with the well-known principle that a statutory construction which restricts or removes a common-law right should not be adopted unless the plain

> words of the statute compel it. See, *Lackman v. Rousselle*, 257 Neb. 87, 596 N.W.2d 15 (1999); *Stoneman v. United Neb. Bank*, 254 Neb. 477, 577 N.W.2d 271 (1998). The NCLA contains neither an express provision nor any language indicating that the NCLA was meant to preclude other remedies that a construction lienholder might pursue to collect a contractual debt. We therefore conclude that the NCLA does not take away a construction lienholder's common-law right to sue for breach of contract.
>
> Because the NCLA does not preclude an action for breach of contract, Tilt-Up was entitled to bring such an action despite the pendency of its construction lien foreclosure action. The only limitation is that any amount recovered for breach of contract damages would be credited to satisfy the construction lien when necessary to prevent a double recovery.

261 Neb. at 68, 621 N.W.2d at 507-08. The Supreme Court therefore concluded in *Tilt-Up II* that because Tilt-Up was not barred from bringing its breach of contract action by the NCLA, the statute of limitations for breach of contract was not tolled for that reason and the second suit was therefore barred.

[8] It seems clear to us, as it apparently did to the district court in the instant case, that the Supreme Court's discussion in *Tilt-Up II* concluding that the remedies upon a construction lien and upon a debt because of breach of contract are distinct and concurrent and may be "'pursued at the same time or in succession,'" 261 Neb. at 68, 621 N.W.2d at 507, means that when foreclosing a construction lien, a second cause of action for damages occasioned by breach of the contract can be brought in the same lawsuit. In the case before us, the construction lien represents the unpaid cost of materials and labor actually expended, except the January and February labor charge of $1,884.88, and the second cause of action for breach of contract represents the lost profits (and Cold Storage does not dispute the amount of such loss) occasioned by Cold Storage's breach of that contract.

In summary, we find that the Supreme Court's decision in *Tilt-Up II* determines the issue raised by Cold Storage's first assignment of error and that the trial court did not commit error

in allowing Preston to proceed on its first cause of action, foreclosure of the construction lien, simultaneously with its second cause of action, lost profits for breach of contract.

Did Preston Timely Perfect Its Construction Lien?

[9] Cold Storage's second assignment of error and argument is that Preston did not timely file its lien. Section 52-137(1) provides: "A claimant's lien does not attach and may not be enforced unless, after entering into the contract under which the lien arises and not later than one hundred twenty days after his or her final furnishing of services or materials, he or she has recorded a lien."

Cold Storage seizes upon the following language from *Occidental S. & L. Assn. v. Cannon*, 184 Neb. 659, 666-67, 171 N.W.2d 166, 171 (1969):

> We also observe that after a contract for material or labor is substantially completed, there should be no unreasonable delay in filing a claim for a lien if one is desired, and the time for filing a lien cannot be delayed by performing minor labor or furnishing minor items of material. The purpose of the mechanic's lien statute is to protect the diligent contractor or materialman, not to provide relief for the careless or negligent one. To permit a contractor or a materialman to string out work on orders is to abort the statute. If the time which is restricted by the statute can be indefinitely extended by minor work or deliveries after a contract is substantially completed, the 4-month limitation period in which to file this class of lien can and will be utterly and completely defeated, permitting the title to property to remain in an unsettled condition, and rights of diligent claimants will be subordinated to those who carelessly or unnecessarily delay to claim their rights.

[10] Cold Storage argues that the only items of material or labor for the Crete Project which occurred within 120 days of March 7, 2003, the date upon which Preston filed his construction lien, were charges for labor beginning January 15, 2003, in the amount of $745.88 for labor by Preston employees and contract labor charges of $1,139, which Preston asserts it performed on behalf of Cold Storage between January 15 and February 13,

2003. Preston's initial response to this argument is that it is Cold Storage's burden to question the validity of the lien or the performance of a contract in a lien foreclosure by pleading such as an affirmative defense, citing *Reeves v. Watkins*, 208 Neb. 804, 305 N.W.2d 815 (1981). In *Reeves*, the court said:

> Furthermore, it was incumbent upon [the appellant] to raise the invalidity or nonperformance of the contract in the mechanic's lien foreclosure. "Objections which go to the validity or existence of the lien or the debt on which it is based may be set up in defense to an action to enforce the lien." 57 C.J.S. *Mechanics' Liens* § 273 (1948).

208 Neb. at 810, 305 N.W.2d at 819.

[11] Moreover, we note that Neb. Ct. R. of Pldg. in Civ. Actions 9(c) (rev. 2003) provides in part: "**Conditions Precedent.** In pleading the performance or occurrence of conditions precedent, it is sufficient to aver generally that all conditions precedent have been performed or have occurred. A denial of performance or occurrence shall be made specifically and with particularity." Such rule is applicable to all "civil actions filed on or after January 1, 2003," and is clearly applicable to this action. See Neb. Ct. R. of Pldg. in Civ. Actions 1 (rev. 2004).

Cold Storage does not direct us to any allegation in its pleadings that the lien sought to be foreclosed was filed later than 120 days after Preston's final furnishing of service or materials. Nor have we found any such allegation in our examination of the record. On the other hand, in accordance with the above-quoted rule 9(c), Preston alleges that within 120 days after the indebtedness accrued, it had filed a construction lien with the register of deeds for Saline County pursuant to § 52-147 in the amount of $321,948 as required by law. Cold Storage's amended answer to the second amended complaint simply admits certain allegations and "denies all of the other allegations contained in the Second Amended Complaint."

[12] While we have found no specific authority holding that noncompliance with the 120-day requirement for the filing of a construction lien is an affirmative defense which is waived if not specifically pled, we so hold for the reasons set forth above. Additionally, such conclusion is analogous to the holding of *Big Crow v. City of Rushville*, 266 Neb. 750, 669 N.W.2d 63 (2003),

that noncompliance with Neb. Rev. Stat. § 13-906 (Reissue 1997) is an affirmative defense which must be pled. Section 13-906 prevents suit under the Political Subdivisions Tort Claims Act unless the governing body of the political subdivision has made final disposition of the claim or, if such final disposition has not been made within 6 months, the claim is withdrawn in writing from consideration of the governing body and suit is instituted. See, also, *Cole v. Isherwood*, 264 Neb. 985, 653 N.W.2d 821 (2002) (discussing 6-month requirement in State Tort Claims Act found in Neb. Rev. Stat. § 81-8,213 (Reissue 2003)). In short, as a general proposition, noncompliance with time limits that are preconditions to an action is an affirmative defense to be specifically pled.

[13,14] As further authority for our holding, we note that the law is well established that matters which seek to avoid a valid contract are affirmative defenses. *Production Credit Assn. v. Eldin Haussemann Farms*, 247 Neb. 538, 529 N.W.2d 26 (1995). Cold Storage does not claim that its contract with Preston is invalid, but, rather, seeks to avoid liability thereunder with respect to the amount sought via the construction lien by its claim that the lien was not timely filed. Such claim is an affirmative defense. For these several reasons, we hold that the failure to file a construction lien within 120 days of the last furnishing of services or materials is an affirmative defense which must be pled with particularity and that the failure to do so waives such defense. Because Cold Storage failed to do so, it has waived any such defense and this assignment of error is without merit. See *Big Crow, supra* (issue of noncompliance with § 13-906 was waived as defense by not affirmatively alleging such in answer).

Can Preston Recover for Labor Charges in January and February 2003 in Amount of $1,884.88?

Cold Storage argues that Preston made no claim for its January and February 2003 labor charges in the amount of $1,884.88, shown on the last page of exhibit 19, because it did not plead such specifically as an element of damage.

The trial court awarded damages of $321,948 "for the work performed and billed" to Cold Storage and "$1,884.88 for work

performed under the contract but not invoiced to [Cold Storage] for maintenance of the compressors." As earlier recited, as a result of Preston's motion for new trial and/or to alter or amend judgment, the trial court amended its judgment to include $748,428 "in lost profits on unperformed future work." Thus, the trial court's total judgment was $1,072,260.88, which includes the $1,884.88 at issue in this assignment of error. Cold Storage does not contend that the work for such sum was not performed, but only that it was not invoiced to Cold Storage, nor was it specifically pled as an item of damage.

Preston's response is multifaceted. Initially, Preston argues that because an appellate court will not consider an issue on appeal that was not presented or passed on by the trial court, citing *Maxwell v. Montey*, 262 Neb. 160, 631 N.W.2d 455 (2001), we should not even consider this assignment of error, as the issue was not raised before the trial court. Next, Preston argues that no objection was made to the offer of exhibit 19, in which such charges were included, which is correct, and that in any event, Preston is entitled to that amount of damages which will compensate it for the loss which fulfillment of the contract would have prevented or the breach of it has entailed, citing *Third Party Software v. Tesar Meats*, 226 Neb. 628, 414 N.W.2d 244 (1987). Finally, Preston argues that the amount of damages to be awarded is a matter for the fact finder which will not be disturbed on appeal if it is supported by the evidence and bears a reasonable relationship to the elements of the damages proved, citing *Union Ins. Co. v. Bailey*, 234 Neb. 257, 450 N.W.2d 661 (1990).

Cold Storage has not cited us to any place in the trial record where it either objected to the specific charges for January and February 2003 put into evidence by way of exhibit 19 or introduced evidence that such charges were not fair, reasonable, and necessary. Accordingly, we conclude that this issue was not properly raised in the trial court and preserved for appellate review. Moreover, the amounts sought for labor in January and February 2003 were within the cause of action for breach of contract, although such amount was not included in the amount of the construction lien. However, the failure to include such in the construction lien does not mean that the amount is not

recoverable, assuming proper proof, and there is no assertion made that Preston did not prove such sum. The trial court's award of such damages is not clearly wrong. For these reasons, we find the assignment of error to be without merit.

CONCLUSION

Finding no merit to any of the assignments of error advanced by Cold Storage, we affirm the trial court's judgment against Cold Storage and in favor of Preston in the amount of $1,072,260.88.

AFFIRMED.

IN RE INTEREST OF MICHAEL S., A CHILD UNDER 18 YEARS OF AGE. STATE OF NEBRASKA, APPELLEE, V. MICHAEL S., APPELLEE, AND NEBRASKA DEPARTMENT OF HEALTH AND HUMAN SERVICES, APPELLANT.

742 N.W.2d 791

Filed December 11, 2007. No. A-07-467.

1. **Statutes: Appeal and Error.** Statutory interpretation presents a question of law, on which an appellate court has an obligation to reach an independent conclusion irrespective of the decision made by the court below.
2. **Juvenile Courts: Words and Phrases.** An adjudication means that a child is a juvenile within the meaning of the Nebraska Juvenile Code, whereas a disposition addresses promotion and protection of a juvenile's best interests.
3. ____: ____. Neb. Rev. Stat. § 43-403(2) (Reissue 2004) defines "committed" as an order by a court committing a juvenile to the care and custody of the Office of Juvenile Services for treatment.
4. ____: ____. "Placed for evaluation" means a placement with the Office of Juvenile Services for purposes of an evaluation of the juvenile.

Appeal from the Separate Juvenile Court of Sarpy County: ROBERT O'NEAL, Judge. Reversed and remanded with directions.

John M. Baker, and, on brief, Charles E. Dorwart, Special Assistant Attorney General, for appellant.

Dennis P. Marks for appellee Michael S.

Sandra K. Markley and Gary E. Brollier, Deputy Sarpy County Attorneys, for appellee State of Nebraska.

INBODY, Chief Judge, and CARLSON and CASSEL, Judges.

CASSEL, Judge.

INTRODUCTION

The Nebraska Department of Health and Human Services (DHHS) appeals from an order which placed custody of Michael S. with the Office of Juvenile Services (OJS) for purposes only of an evaluation, remanded the child's custody to the Sarpy County sheriff's office for placement in secure detention pending further proceedings, and ordered that OJS continue to be responsible for all costs associated with the order not covered by insurance. We conclude that the juvenile court properly placed the child with OJS for an evaluation but exceeded its statutory authority in ordering OJS to pay for all costs not covered by insurance. We therefore reverse, and remand with directions.

BACKGROUND

In an order filed on December 2, 2005, the juvenile court adjudicated the child under Neb. Rev. Stat. § 43-247(3)(b) (Reissue 2004) because he had been habitually truant from school. On March 2, 2006, following a disposition review hearing, the court placed the child on probation and stated that if the child violated rules and regulations, the child could be placed in secure or staff-secure detention. On February 8, 2007, a capias was issued because the child's whereabouts were unknown. Following a hearing, the court vacated the capias, placed the child in the custody of the Sarpy County sheriff's office for placement in staff-secure detention pending further proceedings, and also ordered that the child be placed in the temporary joint custody of DHHS for placement pending further proceedings.

On March 12, 2007, Sarpy County filed an amended supplemental juvenile petition alleging that the child engaged in criminal mischief, causing pecuniary loss of less than $200. In an order filed March 20, the court indicated that it held an arraignment on March 12, adjudicated the child under § 43-247(1), and proceeded to immediate disposition. In a

separate March 20 order, the court stated that it held a disposition review on March 12 and that it found the child was adjudged to be within § 43-247(3)(a) on January 29. (Nothing in the record shows an adjudication under § 43-247(3)(a) or a proceeding on January 29.) The court ordered that the matter be continued to May 14 for a disposition review hearing and that the child remain in the custody of OJS. The order further set forth conditions for the child to follow.

On March 26, 2007, the county attorney filed a motion for capias because the child (1) assaulted his grandfather, (2) was truant from school, (3) canceled therapy appointments, (4) unplugged his OJS electronic monitor, and (5) arranged an unsupervised and unauthorized visit with his mother. Also on March 26, Sarpy County filed a motion for review of disposition based on the above events.

On March 27, 2007, the court held a capias review hearing. During the hearing, an employee of DHHS recommended an OJS evaluation for the child and continued placement at the sheriff's office, the Juvenile Justice Center, or the Douglas County Youth Center. In an order filed on March 28, the court stated that further detention of the child was a matter of immediate and urgent necessity and that the matter was continued to May 14 for a disposition review hearing. The court ordered that it was in the best interests of the child to have an evaluation through OJS, and the court ordered that the child be placed in the custody of OJS for purposes only of the evaluation. The court ordered that the child "be remanded to the custody of the Sarpy County Sheriff for placement at the Juvenile Justice Center or secure detention for detention pending further proceedings." The court further ordered that OJS continue to be responsible for all costs associated with the order not covered by insurance. Finally, the court ordered that the capias previously issued be vacated.

DHHS timely appeals from the March 28, 2007, order.

ASSIGNMENTS OF ERROR

DHHS alleges that the court erred as a matter of law in (1) placing the child's temporary custody with OJS prior to adjudication on the motion for review of disposition and (2) directing

OJS to pay for all of the costs of the child's care and detention prior to adjudication and disposition on the motion for review.

STANDARD OF REVIEW

[1] Statutory interpretation presents a question of law, on which an appellate court has an obligation to reach an independent conclusion irrespective of the decision made by the court below. *In re Interest of Teneko P.*, 15 Neb. App. 463, 730 N.W.2d 128 (2007).

ANALYSIS

DHHS argues in its brief that OJS should not be responsible for costs associated with the care and custody of the child prior to disposition. DHHS cites to statutes such as Neb. Rev. Stat. §§ 43-254 and 43-413 (Reissue 2004) in support of its position.

[2] At oral argument, however, DHHS abandoned its earlier characterization of the order at issue as being entered prior to adjudication. As DHHS now concedes, on December 2, 2005, the juvenile court adjudicated the child under § 43-247(3)(b), and on March 20, 2007, the court adjudicated the child under § 43-247(1). Adjudication means that a child is a juvenile within the meaning of the Nebraska Juvenile Code, whereas a disposition addresses promotion and protection of a juvenile's best interests. *In re Interest of Joshua M. et al.*, 256 Neb. 596, 591 N.W.2d 557 (1999). A ruling on a motion to review disposition is not an "adjudication" as that term is used in the juvenile code. Because the child had been adjudicated, we find § 43-254—which is found in the juvenile code under "preadjudication procedures"—to be inapplicable.

[3,4] As DHHS recognizes in its brief, the Office of Juvenile Services Act distinguishes between placement with OJS and commitment to OJS' custody for purposes of that act. Neb. Rev. Stat. § 43-403(2) (Reissue 2004) defines "committed" as "an order by a court committing a juvenile to the care and custody of [OJS] for treatment." On the other hand, "placed for evaluation" means "a placement with [OJS] for purposes of an evaluation of the juvenile." § 43-403(6). The order at issue stated that "the child herein is hereby placed in the custody of [OJS]

for purposes of the evaluation only." And under § 43-413(1), a court may, following an adjudication but prior to final disposition, place a juvenile with OJS for an evaluation. DHHS concedes that the juvenile court properly placed the child with OJS for purposes of an evaluation.

The primary issue is whether the court erred in ordering that OJS "shall continue to be responsible for all costs associated with the [o]rder herein not covered by insurance." We note that the court's order did not "commit" the child to OJS' custody, and we therefore do not discuss statutes such as § 43-413(3) and Neb. Rev. Stat. § 43-408 (Cum. Supp. 2006), which concern a juvenile who has been committed to OJS' custody.

In *In re Interest of Marie E.*, 260 Neb. 984, 621 N.W.2d 65 (2000), the Nebraska Supreme Court determined that the purpose of § 43-413(4) was to make the State—meaning DHHS—responsible for the costs incurred in evaluating a juvenile under § 43-413(1). The *In re Interest of Marie E.* court stated that in the absence of the immediate physical delivery of the juvenile upon adjudication into an evaluation program, detention was an unavoidable precursor of evaluation and was part of the evaluation process under § 43-413, the cost of which was the responsibility of DHHS. At the time of the decision in *In re Interest of Marie E.*, § 43-413(4) (Reissue 1998) stated, "All costs incurred during the period in which the juvenile is being evaluated at a state facility or a program funded by [OJS] are the responsibility of the state unless otherwise ordered by the court pursuant to section 43-290." In 2001, the Legislature made substantial changes to the statute, see 2001 Neb. Laws, L.B. 640, and § 43-413(4) (Reissue 2004) now provides:

> During any period of detention or evaluation prior to disposition:
>
> (a) Except as provided in subdivision (4)(b) of this section, the county in which the case is pending is responsible for all detention costs incurred before and after an evaluation period prior to disposition, the cost of delivering the juvenile to the facility or institution for an evaluation, and the cost of returning the juvenile to the court for disposition; and

> (b) The state is responsible for (i) the costs incurred during an evaluation unless otherwise ordered by the court pursuant to section 43-290 and (ii) the preevaluation detention costs for any days over the first ten days from the date the evaluation is ordered by the court.

Pursuant to § 43-413(5), OJS is "not responsible for predisposition costs except as provided in subdivision (4)(b) of this section."

We conclude that the juvenile court erred in making OJS responsible for all costs not covered by insurance. Under the plain language of § 43-413(4)(b), Sarpy County is responsible for the cost of the first 10 days of detention after the court ordered the OJS evaluation. Under § 43-413(4)(a), Sarpy County is also responsible for all detention costs incurred after an evaluation period prior to disposition, the cost of delivering the child to the facility or institution for an evaluation, and the cost of returning the child to the court for disposition.

CONCLUSION

We conclude that the juvenile court properly placed the child in the custody of OJS for purposes of an evaluation after the child had been adjudicated under § 43-247. We conclude that the court erred in making OJS responsible for all costs associated with the order which were not covered by insurance. We therefore reverse the juvenile court's order and remand the matter with directions to allocate between OJS and Sarpy County the costs associated with the child's evaluation in accordance with § 43-413(4) and (5).

REVERSED AND REMANDED WITH DIRECTIONS.

IN RE INTEREST OF LAWRENCE H., ALSO KNOWN AS FAREN H., A CHILD UNDER 18 YEARS OF AGE. STATE OF NEBRASKA, APPELLEE, V. IDA H. AND JOSE O., APPELLANTS, AND OMAHA TRIBE OF NEBRASKA, INTERVENOR-APPELLEE.

743 N.W.2d 91

Filed December 11, 2007. No. A-07-592.

1. **Juvenile Courts: Judgments: Appeal and Error.** Cases arising under the Nebraska Juvenile Code are reviewed de novo on the record, and an appellate court is required to reach a conclusion independent of the trial court's findings. In reviewing questions of law arising in such proceedings, an appellate court reaches a conclusion independent of the lower court's ruling.
2. **Jurisdiction: Appeal and Error.** A jurisdictional question which does not involve a factual dispute is determined by an appellate court as a matter of law.
3. **Indian Child Welfare Act: Jurisdiction: Appeal and Error.** A denial of a transfer to tribal court is reviewed for an abuse of discretion.
4. **Judges: Words and Phrases: Appeal and Error.** A judicial abuse of discretion exists when a judge, within the effective limits of authorized judicial power, elects to act or refrain from action, but the selected option results in a decision which is untenable and unfairly deprives a litigant of a substantial right or a just result in matters submitted for disposition through a judicial system.
5. **Juvenile Courts: Jurisdiction: Appeal and Error.** In a juvenile case, as in any other appeal, before reaching the legal issues presented for review, it is the duty of an appellate court to determine whether it has jurisdiction over the matter before it.
6. **Jurisdiction: Final Orders: Appeal and Error.** For an appellate court to acquire jurisdiction of an appeal, there must be a final order entered by the court from which the appeal is taken; conversely, an appellate court is without jurisdiction to entertain appeals from nonfinal orders.
7. **Indian Child Welfare Act: Parental Rights: Jurisdiction: Domicile.** In any state court proceeding for the foster care placement of, or termination of parental rights to, an Indian child not domiciled or residing within the reservation of the Indian child's tribe, the court, in the absence of good cause to the contrary, shall transfer such proceeding to the jurisdiction of the tribe, absent objection by either parent, upon the petition of either parent or the Indian custodian or the Indian child's tribe, except that such transfer shall be subject to declination by the tribal court of such tribe.
8. **Indian Child Welfare Act: Parental Rights: Interventions.** In proceedings to terminate parental rights to an Indian child, the child's tribe shall have the right to intervene at any point in the proceeding.
9. **Indian Child Welfare Act: Jurisdiction: Child Custody: Parental Rights.** Under the Indian Child Welfare Act, if the tribe or either parent of the Indian child petitions for transfer of the proceeding to the tribal court, the state court cannot proceed with the placement of an Indian child living outside a reservation

without first determining whether jurisdiction of the matter should be transferred to the tribe.

10. **Indian Child Welfare Act: Jurisdiction.** That a state court may take jurisdiction under the Indian Child Welfare Act does not necessarily mean that it should do so, as the court should consider the rights of the child, the rights of the tribe, and the conflict of law principles, and should balance the interests of the state and the tribe.
11. **Indian Child Welfare Act: Evidence: Records: Good Cause: Appeal and Error.** Under the Indian Child Welfare Act, factual support must exist in the trial record for the purposes of appropriate appellate review as to good cause for failure to comply with statutory child placement preference directives.
12. **Trial: Attorneys at Law: Evidence.** An attorney's assertions at trial are not to be treated as evidence.
13. **Records: Appeal and Error.** It is incumbent upon the party appealing to present a record which supports the errors assigned; absent such a record, as a general rule, the decision of the lower court is to be affirmed.
14. **Records: Pleadings: Appeal and Error.** When a transcript, containing the pleadings and order in question, is sufficient to present the issue for appellate disposition, a bill of exceptions is unnecessary to preserve an alleged error of law regarding the proceedings under review.

Appeal from the Separate Juvenile Court of Douglas County: CHRISTOPHER KELLY, Judge. Vacated and dismissed in part, and in part reversed and remanded with directions.

Brian S. Munnelly, Brian J. Muench, and Judith A. Zitek for appellants.

Donald W. Kleine, Douglas County Attorney, Renee L. Mathias, and Joshua Yambor, Senior Certified Law Student, for appellee.

Owen L. Farnham, of Anderson & Bressman Law Firm, P.C., L.L.O., guardian ad litem.

INBODY, Chief Judge, and IRWIN and MOORE, Judges.

INBODY, Chief Judge.

INTRODUCTION

Ida H. and Jose O. appeal the order of the separate juvenile court of Douglas County that terminated their parental rights to their son Lawrence H., also known as Faren H. (Faren). Because we conclude that the juvenile court erred in deferring its ruling on the motion to transfer of the Omaha Tribe of Nebraska

(Omaha Tribe), we reverse the juvenile court's denial of the motion to transfer, vacate and dismiss the order terminating parental rights, and remand the cause with directions to transfer the matter to tribal court.

STATEMENT OF FACTS

On June 7, 2005, the State filed a petition alleging, inter alia, that Faren, born June 2, 2005, was a registered member of and/or eligible for enrollment in the Omaha Tribe and came within the meaning of Neb. Rev. Stat. § 43-247(3)(a) (Reissue 2004), being a child who lacked proper parental care due to the faults or habits of his parents, Ida and Jose. The State alleged that statutory grounds for termination of both parents' parental rights existed under Neb. Rev. Stat. § 43-292(2) and (4) (Reissue 2004) and that termination would be in Faren's best interests. The State prayed for termination of Ida's and Jose's parental rights.

On June 14, 2005, the State filed a notice informing the Indian Child Welfare Act (ICWA) specialist for the Omaha Tribe of the petition and of the fact that Faren may be eligible for membership in the Omaha Tribe, thus invoking rights under the ICWA. See 25 U.S.C. § 1901 et seq. (2000) and Neb. Rev. Stat. § 43-1501 et seq. (Reissue 2004).

On August 8, 2005, on behalf of the Omaha Tribe, the tribal prosecutor filed a motion for intervention and a motion to transfer the case to Omaha Tribal Court. A hearing was held on the motions on August 9, and in an order entered on the same day, the juvenile court continued the hearing on the motions for intervention and transfer to September 16 and stated that "this matter shall be set for an Adjudication hearing and scheduled for one day in approximately two months."

On September 16, 2005, Faren's guardian ad litem filed an objection to transfer to tribal court, alleging that good cause existed to deny the Omaha Tribe's motion to transfer and that a transfer would be contrary to Faren's best interests.

At the September 16, 2005, hearing, the juvenile court received evidence that Ida was a member of the Omaha Tribe and that Faren was eligible for enrollment in the Omaha Tribe. Ida and Jose did not object to the transfer. Counsel for the State admitted that while the State did not believe transfer would be in Faren's

best interests, it did not have any evidence showing good cause not to transfer. Faren's guardian ad litem agreed that transferring the matter to tribal court would be contrary to Faren's best interests because the juvenile court had already adjudicated siblings of Faren's and because the juvenile court could offer "better services." The guardian ad litem later clarified that he did not mean to state that the tribal court was incompetent.

The tribal prosecutor responded that the tribal court had access to the same services as the juvenile court and that Faren's siblings' cases were a matter of record. The tribal prosecutor confirmed that most of the witnesses would be in Omaha and acknowledged that the tribal court was "out in the middle of nowhere," about 75 miles from the juvenile court's location, but stated that the tribal court had means of securing appearances and that the distance would not be "that much of a burden." The tribal prosecutor stated that adequate services were available in the tribal court, including medical services that Faren received through the Department of Health and Human Services (DHHS), and continued:

> Your Honor, if I may, if there's further information that you would like in an evidentiary hearing later, I don't believe the child's welfare is prejudiced either way by, you know, the Court taking its time to consider its ruling. I don't think the child's welfare is prejudiced either way, so I don't know that it's incumbent that we have a ruling right now.

Faren's guardian ad litem argued that Faren's placement was in Bellevue, Nebraska, and that requiring his medical providers and other service providers to travel to tribal court was an undue hardship that would not occur if the case were to remain in the juvenile court. The tribal prosecutor admitted that Bellevue was 86 miles from the tribal court. The juvenile court stated that it would take the matter under advisement.

Following the September 16, 2005, hearing, the juvenile court entered an order granting the motion for intervention. The juvenile court further found that "the Omaha Tribe's Notice of Intent to Transfer was objected to by the child's Guardian ad Litem and was taken under advisement by the Court." The juvenile court set the adjudication hearing for October 6.

The juvenile court proceeded with the adjudication hearing on October 6, 2005. Near the outset of the hearing, the following colloquy took place:

> [Ida's counsel]: I don't think the Court can go forward with adjudication until we have the ruling on [the motion to transfer].
>
> THE COURT: You have authority for that?
>
> [Ida's counsel]: No, I don't.
>
> THE COURT: I intend to take up the matter under advisement following the adjudication of the case.
>
> [Ida's counsel]: But if it's transferred, Your Honor, you wouldn't hear the adjudication. That's what the Tribe is asking is that they be allowed to adjudicate this case, not the District of Douglas County.
>
> THE COURT: The Tribe is party to these proceedings, and they can argue it on their own, I think. The transfer can be taken up at any stage of the proceedings, and I've taken it under advisement, and we have parties prepared to go forward here. We have witnesses here. We have the matter which allegedly — a situation which allegedly took place or occurred here in this jurisdiction, and I intend to take the matter up following the adjudication of the matter.

Ida's counsel and guardian ad litem also expressed concerns that Ida could be denied her right to appeal the transfer issue. The tribal prosecutor stated, "The Tribe's position is certainly intervening. The Tribe would request that the transfer motion be heard first just — it's an issue of sovereignty on whether or not the Court adjudicates." The juvenile court concluded that none of the parties had produced legal authority and proceeded with the adjudication. The adjudication hearing was continued to November 17 and 18.

On November 15, 2005, Ida and Jose filed a notice of appeal to this court, appealing the juvenile court's "denial of the Motion to Transfer to Tribal Court filed August 8, 2005 entered by this Court's failure to timely rule on said Motion."

At the November 17, 2005, adjudication hearing, Jose's counsel argued that because of the pending appeal, the juvenile court did not have jurisdiction to order an evaluation and services on behalf of Faren and that "[t]his belongs in the tribal

court." The tribal prosecutor declined to object to services being provided to Faren. The juvenile court determined that it had jurisdiction to act on behalf of Faren's well-being and scheduled the matter for a "continued adjudication check."

The juvenile court conducted adjudication check hearings on February 23 and May 30, 2006. Following each of the hearings, the juvenile court entered an order finding that "this matter continues to pend on appeal in the Nebraska Court of Appeals." The juvenile court ordered the matter to be set for a continued adjudication hearing.

On June 13, 2006, this court dismissed the appeal for lack of jurisdiction because the juvenile court had not denied the motion to transfer and there was no final order from which to appeal. See *In re Interest of Lawrence H.*, No. A-05-1409, 2006 WL 1596519 (Neb. App. June 13, 2006) (not designated for permanent publication).

On August 21, 2006, the juvenile court conducted a continued adjudication hearing. Before the juvenile court heard testimony, Jose's counsel requested a ruling on the transfer issue or an "indication as to when a ruling will take place." The juvenile court declined to rule, stating:

> I declined to rule during the course of trial previously, and that was essentially because we're in the middle of trial, and I'm not going to move a case to another jurisdiction — to the Indian Nation essentially in the middle of trial and certainly not when we have a situation where witnesses are being called who are local and who need to be, I think, reasonably able to attend the proceedings, and I don't want to impose hardship on any of the parties.
>
> . . . .
>
> . . . I'm just saying that [the tribal prosecutor] was not asking for a ruling on [the motion for transfer] until the parties raised it at the adjudication hearing.
>
> So, anyhow, I'm not going to rule on it now. I'm going to — I'd indicate to the parties that I would intend, as I have intended all along, to rule on the matter either at the conclusion of the adjudication hearing or if the matter proceeds to disposition, no later than the disposition portion of the hearing.

The juvenile court proceeded with the adjudication hearing and heard testimony and received exhibits.

The juvenile court continued conducting adjudication hearings from November 30, 2006, until the last adjudication hearing on January 16, 2007.

On April 30, 2007, the juvenile court entered an order terminating Ida's and Jose's parental rights to Faren. The juvenile court specifically found that there was clear and convincing evidence that Faren was a child within the meaning of § 43-247(3)(a), that Faren came within the meaning of § 43-292(2) and (4) beyond a reasonable doubt, and that active but unsuccessful efforts to rehabilitate Ida and Jose had been undertaken. The juvenile court ordered that Faren remain in the custody of DHHS for adoptive planning and placement and authorized DHHS to consent to legal adoption. The juvenile court ordered DHHS to inform the juvenile court if adoption were finalized, at which time jurisdiction of the juvenile court would terminate. Finally, the juvenile court stated, "IT IS FURTHER ORDERED that the Indian Child Welfare Act issue involving transfer of this action to the Omaha Tribe of Nebraska shall be set for continued hearing and scheduled for one-half hour on **May 3, 2007 at 3:15 p.m.**"

As scheduled, on May 3, 2007, the juvenile court conducted an additional hearing on the transfer issue. Counsel for the State, Omaha Tribe Indian Child Welfare, Ida, and Jose were all present, as well as guardians ad litem for Faren, Ida, and Jose. Upon an earlier motion by the tribal prosecutor, the juvenile court continued the hearing to May 29. The juvenile court noted that there would probably be an appeal of the termination order and stated, "My intention is to provide the parties with all possible appealable issues to have them ripe for a hearing at one time, and that's why I did call the short notice hearing."

The bill of exceptions for the May 29, 2007, hearing was not made a part of the record on appeal by the parties.

On May 29, 2007, following the May 29 hearing, the juvenile court rendered an order denying the Omaha Tribe's motion for transfer on the basis of the doctrine of forum non conveniens. On May 29 in the juvenile court, Ida and Jose filed their notice

of appeal of the April 30, 2007, order that terminated their parental rights.

ASSIGNMENTS OF ERROR

Ida and Jose contend that the juvenile court erred in denying transfer to the tribal court. Ida and Jose also allege several errors pertaining to the termination proceedings and findings.

STANDARD OF REVIEW

[1,2] Cases arising under the Nebraska Juvenile Code are reviewed de novo on the record, and an appellate court is required to reach a conclusion independent of the trial court's findings. In reviewing questions of law arising in such proceedings, an appellate court reaches a conclusion independent of the lower court's ruling. *In re Interest of Destiny S.*, 263 Neb. 255, 639 N.W.2d 400 (2002). A jurisdictional question which does not involve a factual dispute is determined by an appellate court as a matter of law. *In re Interest of Anthony R. et al.*, 264 Neb. 699, 651 N.W.2d 231 (2002).

[3,4] A denial of a transfer to tribal court is reviewed for an abuse of discretion. See *In re Interest of Brittany C. et al.*, 13 Neb. App. 411, 693 N.W.2d 592 (2005). A judicial abuse of discretion exists when a judge, within the effective limits of authorized judicial power, elects to act or refrain from action, but the selected option results in a decision which is untenable and unfairly deprives a litigant of a substantial right or a just result in matters submitted for disposition through a judicial system. *In re Interest of L.V.*, 240 Neb. 404, 482 N.W.2d 250 (1992).

ANALYSIS

Appellate Jurisdiction.

[5,6] We first address the State's contention that this court lacks jurisdiction because the juvenile court did not rule on the motion to transfer before this appeal was filed. In a juvenile case, as in any other appeal, before reaching the legal issues presented for review, it is the duty of an appellate court to determine whether it has jurisdiction over the matter before it. *In re Interest of Dakota L. et al.*, 14 Neb. App. 559, 712 N.W.2d 583 (2006). For an appellate court to acquire jurisdiction of an

appeal, there must be a final order entered by the court from which the appeal is taken; conversely, an appellate court is without jurisdiction to entertain appeals from nonfinal orders. *In re Interest of Anthony R. et al.*, 264 Neb. 699, 651 N.W.2d 231 (2002). Having reviewed the record, including the supplemental transcript consisting of the juvenile court's order denying the motion for transfer, we conclude that Ida and Jose timely appealed a final, appealable order and that we have jurisdiction to address this appeal.

Denial of Transfer to Tribal Court.

Ida and Jose assert that the juvenile court erred in denying the motion to transfer the proceedings to tribal court. As recounted above, the motion to transfer was filed early in the proceedings, but the juvenile court deferred ruling on the motion until after ordering termination of Ida's and Jose's parental rights.

[7-9] Neb. Rev. Stat. § 43-1504(2) (Reissue 2004) provides:

> In any state court proceeding for the foster care placement of, or termination of parental rights to, an Indian child not domiciled or residing within the reservation of the Indian child's tribe, the court, in the absence of good cause to the contrary, shall transfer such proceeding to the jurisdiction of the tribe, absent objection by either parent, upon the petition of either parent or the Indian custodian or the Indian child's tribe, except that such transfer shall be subject to declination by the tribal court of such tribe.

In proceedings to terminate parental rights to an Indian child, the child's tribe shall have the right to intervene at any point in the proceeding. See § 43-1404(3). Presumably, the tribe may also file a motion to transfer at any point in the proceedings. However, under the ICWA, if the tribe or either parent of the Indian child petitions for transfer of the proceeding to the tribal court, the state court cannot proceed with the placement of an Indian child living outside a reservation without first determining whether jurisdiction of the matter should be transferred to the tribe. *In re Interest of C.W. et al.*, 239 Neb. 817, 479 N.W.2d 105 (1992) (citing 25 U.S.C. § 1911(b) (2000), which mirrors § 43-1504(2)).

[10] In *In re Interest of Brittany C. et al.*, 13 Neb. App. 411, 423, 693 N.W.2d 592, 602-03 (2005), we observed the following: "That a state court may take jurisdiction does not necessarily mean that it should do so, as the court should consider the rights of the child, the rights of the tribe, and the conflict of law principles, and should balance the interests of the state and the tribe." Citing *In re Interest of C.W. et al., supra*. On this basis, we determined that the denial of a transfer to tribal court is reviewed for an abuse of discretion.

In *In re Interest of Brittany C. et al., supra*, we determined that an order denying requests to transfer jurisdiction to a tribal court affected a substantial right in a special proceeding. In so doing, we stated:

> [T]he request to transfer jurisdiction in the instant case is not merely a step or a proceeding within the overall action. If the request were granted, the pending proceedings would stop and these matters would be transferred to another forum. While a tribal court in some respects may resemble a judicial forum based on Anglo-Saxon judicial traditions, it may differ in other respects consistent with the tribal court's Native American traditions. . . .
>
> Further, in adopting the [Nebraska] ICWA, the Legislature determined that Nebraska public policy should "'cooperate fully with Indian tribes in Nebraska in order to ensure that the intent and provisions of the federal [ICWA] are enforced.'" Neb. Rev. Stat. § 43-1502 (Reissue 2004). In the federal act, Congress recognized the special relationship between the United States and the Indian tribes and the federal responsibility to Indian people; Congress found, inter alia, that (1) there is no resource that is more vital to the continued existence and integrity of Indian tribes than their children; (2) the United States has a direct interest, as trustee, in protecting Indian children who are members of or are eligible for membership in an Indian tribe; (3) an alarmingly high percentage of Indian families are broken up by the removal, often unwarranted, of their children from them by nontribal public and private agencies; (4) an alarmingly high percentage of such children are placed in non-Indian foster and adoptive homes and

> institutions; and (5) the states, exercising their recognized jurisdiction over Indian child custody proceedings through administrative and judicial bodies, have often failed to recognize the essential tribal relations of Indian people and the cultural and social standards prevailing in Indian communities and families. 25 U.S.C. § 1901 (2000). These findings emphasize Congress' determination that a tribal court may provide the parent and the child with significant advantages inherent in the recognition and implementation of Native American customs and traditions.

In re Interest of Brittany C. et al., 13 Neb. App. at 421, 693 N.W.2d at 601-02.

[11-14] In the instant case, the juvenile court based its denial of the motion for transfer on the doctrine of forum non conveniens, a valid basis for good cause to deny transfer. See, e.g., *In re Interest of Brittany C. et al., supra*; *In re Interest of C.W. et al., supra.* However, under the ICWA, factual support must exist in the trial record for the purposes of appropriate appellate review as to good cause for failure to comply with statutory child placement preference directives. See *In re Interest of Bird Head*, 213 Neb. 741, 331 N.W.2d 785 (1983). There is no evidence in the record before us that the juvenile court heard sworn testimony regarding good cause, and we cannot rely on the assertions of counsel to evaluate the juvenile court's finding. See *City of Lincoln v. MJM, Inc.*, 9 Neb. App. 715, 618 N.W.2d 710 (2000) (attorney's assertions at trial are not to be treated as evidence). The bill of exceptions from the May 29, 2007, hearing on the motion to transfer is not before us, and although the resultant order indicates that the juvenile court heard arguments from the parties, there was no indication that the juvenile court heard any evidence to support its findings. We recognize that it is incumbent upon the party appealing to present a record which supports the errors assigned; absent such a record, as a general rule, the decision of the lower court is to be affirmed. *In re Interest of R.R.*, 239 Neb. 250, 475 N.W.2d 518 (1991). However, when a transcript, containing the pleadings and order in question, is sufficient to present the issue for appellate disposition, a bill of exceptions is unnecessary to preserve an alleged error of law regarding the proceedings under review.

Foster v. Foster, 266 Neb. 32, 662 N.W.2d 191 (2003). In this case, we are most concerned with the juvenile court's delay in denying the motion to transfer, and the record before us, even without the bill of exceptions of the final hearing, is sufficient to present that issue.

Section 43-1504(2) requires transfer to tribal court absent a showing of good cause. Regardless of what evidence may have been presented at the May 29, 2007, hearing, the juvenile court commenced with trial without any evidence of good cause. The juvenile court deliberately delayed ruling on the motion to transfer for almost 22 months, until after it had conducted complete termination proceedings and after it had entered an order terminating Ida's and Jose's parental rights. In so doing, the juvenile court contravened the Nebraska Supreme Court's interpretation of the ICWA and the ICWA's underlying intent and conducted termination proceedings that, without a showing of good cause, rightly belonged in the tribal court.

We conclude that the juvenile court's refusal to rule on the motion to transfer before proceeding with termination proceedings was erroneous and an abuse of discretion. Therefore, we reverse the juvenile court's denial of the motion to transfer, vacate and dismiss the order terminating parental rights, and remand, with directions to transfer the matter to tribal court.

VACATED AND DISMISSED IN PART, AND IN PART REVERSED AND REMANDED WITH DIRECTIONS.

STATE OF NEBRASKA, APPELLEE, V.
CHAD A. BRAUER, APPELLANT.
743 N.W.2d 655

Filed December 18, 2007. No. A-07-256.

1. **Judgments.** The meaning of a judgment is determined, as a matter of law, by its contents.
2. ____. Unless the language used in a judgment is ambiguous, the effect of the decree must be declared in the light of the literal meaning of the language used.
3. ____. If the language of a judgment is ambiguous, there is room for construction.
4. **Judgments: Words and Phrases.** A judgment is ambiguous if a word, phrase, or provision has at least two reasonable but conflicting meanings.

5. **Judgments.** In ascertaining the meaning of an ambiguous judgment, resort may be had to the entire record.
6. **Investigative Stops: Motor Vehicles.** Upon stopping a vehicle for a traffic violation, it is lawful to detain the driver while checking the registration and the license of the driver.
7. **Investigative Stops: Motor Vehicles: Miranda Rights.** Roadside questioning of a driver detained pursuant to a routine traffic stop does not constitute custodial interrogation for purposes of *Miranda*. There must be some further action or treatment by the police to render a driver in custody and entitled to *Miranda* warnings.

Appeal from the District Court for Lincoln County, DONALD E. ROWLANDS II, Judge, on appeal thereto from the County Court for Lincoln County, KENT D. TURNBULL, Judge. Judgment of District Court affirmed.

James D. McFarland, of McFarland Law Office, for appellant.

Jon Bruning, Attorney General, and George R. Love for appellee.

INBODY, Chief Judge, and IRWIN and MOORE, Judges.

IRWIN, Judge.

I. INTRODUCTION

Chad A. Brauer appeals an order of the district court which affirmed the county court's conviction and sentencing of Brauer on a charge of second-offense driving under the influence of alcohol (DUI). On appeal, Brauer asserts that the district court erred in denying Brauer's motion for reconsideration and rehearing, in which Brauer asserted that the county court had entered an ambiguous judgment by finding Brauer guilty of DUI *or* operating a motor vehicle with an impermissible blood alcohol concentration. Additionally, Brauer asserts that the district court erred in affirming the county court's orders denying Brauer's motions in limine and for suppression of statements and that the district court erred in affirming Brauer's conviction. We find that based on the entire record, it is clear that in its judgment, the county court found Brauer guilty of both DUI and operating a motor vehicle with an impermissible blood alcohol concentration. Additionally, we find no merit to Brauer's assertions

concerning his pretrial motions and we find that there was sufficient evidence to support Brauer's conviction. We affirm.

II. BACKGROUND

On October 24, 2004, Trooper Jarrod Connelly was on patrol when he observed a vehicle driven by Brauer exceeding the speed limit. Trooper Connelly stopped the vehicle and made contact with Brauer and the vehicle's other two occupants. According to Trooper Connelly, he detected an odor of alcohol coming from inside the vehicle. Trooper Connelly asked Brauer if he had consumed any alcohol, and Brauer replied, "'[A] couple.'" Trooper Connelly then asked Brauer to step back to the patrol car "so [he] could . . . isolate the odor" of alcohol.

Brauer sat in the passenger seat of Trooper Connelly's patrol car, and Trooper Connelly detected an odor of alcohol on Brauer's breath. Trooper Connelly oberved that Brauer's eyes were bloodshot and watery. Trooper Connelly asked Brauer again if he had consumed alcohol, and Brauer replied that he had consumed "'four beers.'" Trooper Connelly administered a number of field sobriety tests, during which Brauer displayed signs of impairment. Trooper Connelly then administered a preliminary breath test, the result of which was "above . . . the legal limit."

Based on his observations and experience, Trooper Connelly believed that Brauer was under the influence of alcohol. As a result, Trooper Connelly placed Brauer under arrest. Trooper Connelly transported Brauer to a hospital where his blood was drawn for a blood alcohol concentration test.

On November 9, 2004, the State filed a complaint in county court charging Brauer with DUI or with operating a motor vehicle when his blood alcohol content was .08 grams of alcohol or more per 100 milliliters of blood, pursuant to Neb. Rev. Stat. § 60-6,196 (Reissue 2004). The State alleged that this was a second offense. On November 12, Brauer entered a plea of not guilty.

On February 23, 2005, Brauer filed a motion in limine to exclude from trial the result of the preliminary breath test. At trial, the county court ruled that the preliminary breath test result

was admissible solely for the purpose of determining whether Trooper Connelly had probable cause to arrest Brauer.

On March 23, 2005, Brauer filed a motion to suppress the statements he made to Trooper Connelly indicating that he had consumed four beers prior to driving. On May 6, the county court entered an order overruling the motion to suppress.

On November 2, 2005, Brauer filed a motion in limine to exclude from trial the result of the blood test. Brauer argued at the hearing on the motion that the sample was not properly refrigerated after testing to allow him to independently test it. On January 18, 2006, the county court entered an order overruling this motion in limine.

On May 26, 2006, a bench trial was held. On May 31, the county court entered an order finding Brauer guilty. The county court's order specifically held that Brauer was guilty of operating a motor vehicle "while under the influence of alcoholic liquor *or* while he had a concentration of eight-hundredths of one gram or more by weight of alcohol per one hundred milliliters of his blood." (Emphasis supplied.) On August 31, the county court entered an order sentencing Brauer.

On September 14, 2006, Brauer filed a notice of appeal to the district court. On February 5, 2007, the district court entered an order reversing in part and affirming in part. The district court held that the county court erred in admitting the result of the blood test and, accordingly, in finding Brauer guilty of operating a motor vehicle while having an impermissible blood alcohol content. However, the district court held that there was sufficient evidence to sustain Brauer's conviction on the basis of Brauer's being under the influence of alcohol.

On February 16, 2007, Brauer filed a motion for reconsideration and rehearing, asserting that the county court's judgment had been ambiguous. On March 6, the district court pronounced a ruling on the motion, but did not enter a written, signed, and file-stamped order. Also on March 6, Brauer filed his notice of appeal. On April 9, the district court entered a written, signed, and file-stamped order overruling the motion for reconsideration and rehearing. Although the motion for reconsideration and rehearing was not a proper motion to be filed in this case where the district court was sitting as an intermediate court of

appeals, see *Goodman v. City of Omaha*, 274 Neb. 539, 742 N.W.2d 26 (2007), Brauer's appeal was timely because it was filed within 30 days of entry of the district court's final order on February 5.

III. ASSIGNMENTS OF ERROR

Brauer has assigned three errors on appeal: (1) The district court erred in denying Brauer's motion for reconsideration and rehearing, in which Brauer asserted that the county court had entered an ambiguous judgment by finding Brauer guilty of DUI *or* operating a motor vehicle with an impermissible blood alcohol concentration; (2) the district court erred in affirming the county court's orders denying Brauer's motions in limine and for suppression of statements; and (3) the district court erred in affirming Brauer's conviction.

IV. ANALYSIS

1. Ambiguous County Court Judgment

First, Brauer argues that the county court's use of the word "or" in the judgment convicting Brauer rendered the verdict ambiguous because it is not clear whether the county court intended to find Brauer guilty of (1) DUI or (2) driving while having an impermissible concentration of alcohol in his blood. We conclude, based on the entire record, that Brauer was charged and tried on alternate theories, the evidence received by the county court supported a conviction on both theories, and the county court's order, despite its use of the word "or," was a finding of guilt on both theories.

[1-5] Resolution of this issue requires us to ascertain the meaning of the county court's judgment. In other contexts, it has been recognized that the meaning of a judgment is determined, as a matter of law, by its contents. *Davis v. Crete Carrier Corp.*, 15 Neb. App. 241, 725 N.W.2d 562 (2006); *In re Interest of Teela H.*, 3 Neb. App. 604, 529 N.W.2d 134 (1995). Unless the language used in a judgment is ambiguous, "'the effect of the decree must be declared in the light of the literal meaning of the language used.'" *In re Interest of Teela H.*, 3 Neb. App. at 609, 529 N.W.2d at 138, quoting *Bokelman v. Bokelman*, 202 Neb. 17, 272 N.W.2d 916 (1979).

See *Label Concepts v. Westendorf Plastics*, 247 Neb. 560, 528 N.W.2d 335 (1995). If the language of a judgment is ambiguous, there is room for construction. *Id.*; *Davis v. Crete Carrier Corp., supra*. A judgment is ambiguous if a word, phrase, or provision has at least two reasonable but conflicting meanings. *Davis v. Crete Carrier Corp., supra.* In ascertaining the meaning of an ambiguous judgment, resort may be had to the entire record. *Id.*

The above propositions are in many ways similar to the existing framework that guides our resolution of issues where a court sentencing a criminal defendant has pronounced an ambiguous sentence. In that context, it has been held that if it is unclear what the trial court intended in imposing a sentence because of a discrepancy between the oral pronouncement of sentence and the written judgment imposing sentence, that ambiguity can be resolved by relying on the oral pronouncement of sentence. See *State v. Temple*, 230 Neb. 624, 432 N.W.2d 818 (1988). On the other hand, if an oral pronouncement of sentence is invalid but the written judgment imposing sentence is valid, the written judgment is looked to and considered controlling. See *State v. Sorenson*, 247 Neb. 567, 529 N.W.2d 42 (1995). We have also held that where there is an ambiguity in the judgment indicating that a finding of guilt was based on a plea of guilty where the record demonstrates that there was a trial and the finding of guilt was based on the evidence adduced thereon, we look to the record and presume that a plea of not guilty was entered prior to or at trial. See *State v. Erb*, 6 Neb. App. 672, 576 N.W.2d 839 (1998).

In the present case, Brauer was charged in county court by a complaint that alleged Brauer was guilty of operating a motor vehicle "while under the influence of alcoholic liquor . . . *or* while he had" an impermissible concentration of alcohol in his blood. (Emphasis supplied.) The language of the complaint is based on the language of § 60-6,196(1), which provides three separate grounds for finding that a defendant is guilty of DUI. A review of the record demonstrates that the State adduced evidence to prove DUI under both theories alleged in the complaint: The arresting officer, Trooper Connelly, presented testimony about his observations of Brauer, Brauer's performance

on field sobriety tests, and his opinion that Brauer was under the influence of alcohol, and a technologist from a medical laboratory presented testimony that she ran a blood alcohol concentration test on a sample of Brauer's blood and that the blood alcohol content was .16 grams of alcohol per 100 milliliters of his blood.

Although the district court subsequently found that the county court erred in receiving the blood alcohol test result—an issue that has not been presented for our review—at the conclusion of the trial, the State had adduced sufficient evidence to support a conviction under both theories of guilt presented by the State. First, as noted below, there was sufficient evidence to support a finding that Brauer had been operating a motor vehicle "while under the influence" of alcohol. Second, although basing its case under the alternate theory on inadmissible evidence, the State had adduced evidence to support a finding that Brauer had been driving while having an impermissible concentration of alcohol in his blood. Based upon that record, the county court entered the judgment at issue.

The county court's judgment essentially mirrors the language set forth in the State's complaint. The judgment indicates that the court was finding Brauer "guilty of operating and being in actual physical control of a motor vehicle while under the influence of alcoholic liquor or while he had" an impermissible concentration of alcohol in his blood. The court also specifically indicated, in ruling that there was probable cause to arrest Brauer, that it had found Trooper Connelly's testimony to be "credible, consistent with previous testimony and . . . supported by the visual evidence in [a videotape of the stop]."

Based on the entire record, we conclude that the county court's judgment was a finding that the State had adduced sufficient evidence to support a conviction under both theories of guilt. As such, we find no merit to Brauer's assertion that the case should be remanded for entry of a new judgment.

2. Pretrial Motions

Brauer also argues that the district court erred in upholding the county court's rulings on several of Brauer's pretrial motions. Specifically, prior to trial, Brauer moved in limine to

prevent the State from adducing evidence of the preliminary breath test result and moved to suppress statements that he made prior to being arrested and without *Miranda* warnings. We find that the county court properly received the preliminary breath test result only on the issue of whether there was probable cause to arrest Brauer. We also find that the court properly overruled Brauer's motion to suppress, because he was not in custody at the time of the statements and therefore was not entitled to *Miranda* warnings.

First, Brauer argues in his brief that he objected to the State's questioning of Trooper Connelly concerning whether the preliminary breath test result was above or below the legal limit and that the county court erred in admitting "such evidence . . . as part of the evidence upon which the trial court apparently relied in finding [Brauer] guilty of [DUI]." Brief for appellant at 13. The record indicates, however, that the court did not receive the result as substantive evidence of Brauer's guilt or innocence. Rather, when Brauer objected, the court inquired of the State why the evidence was being offered and the State responded that it was being offered only on the issue of probable cause to arrest Brauer. The court specifically indicated that the result was being received only for purposes of the arrest. As such, there is no merit to Brauer's assertion that the preliminary breath test result was improperly received, as the court received the result solely on the issue of probable cause.

Second, Brauer asserts that the county court erred in denying his motion to suppress statements, because, according to Brauer, the roadside detention of Brauer became a custodial interrogation requiring *Miranda* warnings. We conclude that Trooper Connelly's questioning of Brauer in the present case constituted on-the-scene questioning and investigation, not custodial interrogation, and that *Miranda* warnings were therefore not required.

In *Miranda v. Arizona*, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966), the U.S. Supreme Court established procedural safeguards to protect a citizen's right against self-incrimination. However, the *Miranda* decision distinguished preliminary investigation from custodial interrogation. *Miranda* applies only to interrogations initiated by law officers after a

person has been taken into custody or deprived of his freedom in any significant way. *State v. Holman*, 221 Neb. 730, 380 N.W.2d 304 (1986). "'The Miranda procedures . . . were not meant to preclude law enforcement personnel from performing their traditional investigatory functions such as general on-the-scene questioning . . . .'" *Id.* at 736, 380 N.W.2d at 309, quoting *State v. Bennett*, 204 Neb. 28, 281 N.W.2d 216 (1979). Thus, "'In on-the-scene investigations the police may interview any person not in custody and not subject to coercion for the purpose of determining whether a crime has been committed and who committed it.'" *State v. Holman*, 221 Neb. at 736, 380 N.W.2d at 309, quoting *State v. Dubany*, 184 Neb. 337, 167 N.W.2d 556 (1969).

[6,7] Upon stopping a vehicle for a traffic violation, it is lawful to detain the driver while checking the registration and the license of the driver. *State v. Holman, supra*. Roadside questioning of a driver detained pursuant to a routine traffic stop does not constitute custodial interrogation for purposes of *Miranda*. *State v. Holman, supra*. Instead, there must be some further action or treatment by the police to render a driver in custody and entitled to *Miranda* warnings. *State v. Holman, supra*.

In *State v. Holman*, the defendant was initially stopped for a traffic violation. Upon approaching the defendant's vehicle to investigate the traffic stop, an officer noticed that the vehicle's trunk lid was up and that there were four new, large tires stacked in the trunk. The officer asked the defendant questions about the tires, unrelated to the initial traffic stop, and placed the defendant in the back seat of his cruiser while he ran a driver's history check, a warrants check, and a registration check. Prior to trial, the defendant sought to suppress testimony concerning her answers and silence in response to the officer's questions about the tires and argued that she had been placed in custody and not given *Miranda* warnings. The Nebraska Supreme Court held that there was no custodial interrogation and that the officer's actions amounted to on-the-scene investigation and questioning and did not require *Miranda* warnings.

In the present case, Brauer was initially stopped for a traffic violation. Upon contact with Brauer, Trooper Connelly detected an odor of alcohol, and Brauer acknowledged having been

drinking. Trooper Connelly placed Brauer in the cruiser to conduct on-the-scene investigation and questioning, based on his reasonable, articulable suspicion that Brauer might have been driving while intoxicated. We conclude that the county court did not err in denying Brauer's motion to suppress his statements. This assigned error is without merit.

3. Sufficiency of Evidence

Finally, Brauer argues that the evidence adduced at trial was insufficient to support his conviction. Brauer's argument in this regard appears to depend heavily on the assertions of error discussed above, that the county court's order was ambiguous and that the county court erred in allowing evidence of the preliminary breath test result and in denying his motion to suppress statements. In addition to finding no merit to those assertions, we also find that there was sufficient evidence to support a conviction for DUI.

A violation of § 60-6,196 is one offense which can be proven in more than one way. *State v. Baue*, 258 Neb. 968, 607 N.W.2d 191 (2000). Section 60-6,196 provides that a person may be guilty of DUI if the evidence establishes that the person operated a motor vehicle while under the influence of alcohol or while having an impermissible blood or breath alcohol content. After sufficient foundation is laid, a law enforcement officer may testify that in his or her opinion, a defendant was driving while intoxicated. *State v. Baue, supra*.

In this case, as noted above, Trooper Connelly, after sufficient foundation was laid concerning his background and experience, testified concerning his observations of Brauer. Trooper Connelly testified that there was an odor of alcohol on Brauer's breath, that Brauer's eyes were bloodshot and watery, and that Brauer demonstrated signs of intoxication during field sobriety tests. In addition, Brauer acknowledged consuming four beers prior to driving. This evidence, viewed in a light most favorable to the State, is sufficient to support a finding that Brauer was driving while intoxicated. This assignment of error is without merit.

V. CONCLUSION

We find no merit to Brauer's assignments of error on appeal. We find, when considering the entire record, that the county

court's judgment was a judgment of guilt on both theories of DUI advanced in the State's complaint. We find no error concerning the county court's denial of Brauer's pretrial motions, and we find the evidence was sufficient to support the conviction. As such, we affirm.

AFFIRMED.

JEROME G. HEPPLER, APPELLEE, V.
OMAHA CABLE, INC., APPELLANT.
743 N.W.2d 383

Filed December 18, 2007. No. A-07-365.

1. **Workers' Compensation: Appeal and Error.** Pursuant to Neb. Rev. Stat. § 48-185 (Reissue 2004), an appellate court may modify, reverse, or set aside a Workers' Compensation Court decision only when (1) the compensation court acted without or in excess of its powers; (2) the judgment, order, or award was procured by fraud; (3) there is no sufficient competent evidence in the record to warrant the making of the order, judgment, or award; or (4) the findings of fact by the compensation court do not support the order or award.
2. ____: ____. Upon appellate review, the findings of fact made by the trial judge of the compensation court have the effect of a jury verdict and will not be disturbed unless clearly wrong.
3. ____: ____. An appellate court is obligated in workers' compensation cases to make its own determinations as to questions of law.
4. **Jurisdiction: Appeal and Error.** Before reaching the legal issues presented for review, it is the duty of an appellate court to settle jurisdictional issues presented by a case.
5. **Final Orders: Appeal and Error.** A party may appeal from a court's order only if the decision is a final, appealable order.
6. ____: ____. Final orders include an order affecting a substantial right made during a special proceeding.
7. **Workers' Compensation: Final Orders: Appeal and Error.** Special proceedings include workers' compensation cases.
8. **Workers' Compensation: Employer and Employee.** As a general rule, an employer may not unilaterally terminate a workers' compensation award of indefinite temporary total disability benefits absent a modification of the award of benefits.
9. **Statutes: Appeal and Error.** Appellate courts give statutory language its plain and ordinary meaning and will not resort to interpretation to ascertain the meaning of statutory words which are plain, direct, and unambiguous.
10. **Statutes.** It is not within the province of a court to read a meaning into a statute that is not warranted by the language; neither is it within the province of a court to read anything plain, direct, and unambiguous out of a statute.

11. ____. If the language of a statute is clear, the words of such statute are the end of any judicial inquiry regarding its meaning.
12. **Workers' Compensation: Words and Phrases.** "Temporary" and "permanent" refer to the duration of disability, while "total" and "partial" refer to the degree or extent of the diminished employability or loss of earning capacity.
13. **Workers' Compensation.** Temporary total disability benefits are a species of total disability benefits.
14. ____. The 300-week limitation found in Neb. Rev. Stat. § 48-121(2) (Reissue 2004) does not apply to benefits for temporary total disability awarded under § 48-121(1).
15. **Workers' Compensation: Words and Phrases.** Temporary disability ordinarily continues until the claimant is restored so far as the permanent character of his or her injuries will permit.
16. **Workers' Compensation.** Compensation for temporary disability ceases as soon as the extent of the claimant's permanent disability is ascertained.
17. **Workers' Compensation: Attorney Fees.** If an employee files an application for a review before the Workers' Compensation Court from an order of a judge of the compensation court denying an award and obtains an award or if an employee files an application for a review before the compensation court from an award of a judge of the compensation court when the amount of compensation due is disputed and obtains an increase in the amount of such award, the compensation court may allow the employee a reasonable attorney's fee to be taxed as costs against the employer for such review.

Appeal from the Workers' Compensation Court. Affirmed.

Jeffrey A. Silver for appellant.

Brett McArthur and Martin G. Cahill for appellee.

INBODY, Chief Judge, and CARLSON and CASSEL, Judges.

CASSEL, Judge.

INTRODUCTION

Omaha Cable, Inc., ceased paying temporary total disability benefits to Jerome G. Heppler after making 300 weeks of payments. The trial court overruled Heppler's motion to compel payment of temporary total disability benefits and his motion for penalties and attorney fees. The review panel reversed, ordering the temporary total disability benefits to continue and awarding Heppler $2,500 in attorney fees. Omaha Cable appeals, arguing that Heppler's entitlement to temporary total disability payments ceased after 300 weeks and that Heppler

should not have been awarded attorney fees. We conclude that under Neb. Rev. Stat. § 48-121(1) (Reissue 2004), the entitlement to temporary total disability benefits is not limited to 300 weeks. Because Heppler obtained an increase in benefits upon his application for review, the award of attorney fees was appropriate. We therefore affirm the decision of the review panel.

BACKGROUND

Heppler suffered a back injury in an accident arising out of and in the course of his employment with Omaha Cable. In its November 2004 award, the trial court found that Heppler was temporarily totally disabled during certain specified periods of time and that he remained temporarily totally disabled. The court ordered Omaha Cable to pay Heppler $487 per week for 187 weeks of temporary total disability, and a like sum each week for so long as Heppler remained temporarily totally disabled. The award also provided, "If [Heppler's] total disability ceases, he shall be entitled to the statutory amounts of compensation for any residual permanent partial disability or loss of earning capacity due to this accident and injury." Omaha Cable appealed to the review panel, which affirmed the trial court's award. On further appeal to this court, the decision of the review panel was affirmed in a memorandum opinion filed December 5, 2005, in case No. A-05-644.

At some time, Heppler filed a motion to compel payment of temporary total disability benefits and attorney fees. This motion was not made a part of the record on appeal. On June 14, 2006, the trial court held a hearing. Heppler's counsel represented to the court that Heppler was still temporarily totally disabled. The trial court requested confirmation that no application for modification of the award had been filed. Heppler's counsel expressly confirmed that fact, and counsel for Omaha Cable did not disagree. Counsel for Omaha Cable stated that after the November 2004 award, Omaha Cable issued a check for 159 weeks of benefits totaling $77,433, which would bring Heppler up to his 300 weeks of benefits. On July 11, the trial court overruled Heppler's motion to compel payment of temporary total disability benefits and attorney fees and his motion

for penalties and attorney fees. On July 19, Heppler filed an application for review.

On March 9, 2007, the review panel entered an order of reversal and remand on review. The order stated that Omaha Cable had not filed an application to modify and remained liable for weekly temporary total disability benefits. We digress to note that notwithstanding the review panel's recitation that Omaha Cable had not filed an application to modify, the record does show that an application to modify had been filed on January 8, 2007. Obviously, based upon the date of filing, the trial court did not consider or take action upon the application to modify. The merits of such application are not before us in the instant appeal. The review panel concluded that the trial court erred in denying Heppler's request for attorney fees and penalties, and it remanded the matter to the trial court for a determination of the same. The review panel reasoned that the trial court did not need to enter an order for continued payment of disability benefits because Omaha Cable was still obligated under the initial award to make such payments. Finally, the review panel awarded Heppler $2,500 in attorney fees because he appealed and received an increase in the award.

Omaha Cable timely appeals.

ASSIGNMENTS OF ERROR

Omaha Cable alleges that the review panel erred in (1) finding that Heppler was entitled to temporary total disability benefits beyond 300 weeks and (2) awarding attorney fees.

STANDARD OF REVIEW

[1] Pursuant to Neb. Rev. Stat. § 48-185 (Reissue 2004), an appellate court may modify, reverse, or set aside a Workers' Compensation Court decision only when (1) the compensation court acted without or in excess of its powers; (2) the judgment, order, or award was procured by fraud; (3) there is no sufficient competent evidence in the record to warrant the making of the order, judgment, or award; or (4) the findings of fact by the compensation court do not support the order or award. *Davis v. Crete Carrier Corp.*, 274 Neb. 362, 740 N.W.2d 598 (2007).

[2,3] Upon appellate review, the findings of fact made by the trial judge of the compensation court have the effect of a jury verdict and will not be disturbed unless clearly wrong. *Id.* An appellate court is obligated in workers' compensation cases to make its own determinations as to questions of law. *Id.*

ANALYSIS

Jurisdiction.

[4] Before reaching the legal issues presented for review, it is the duty of an appellate court to settle jurisdictional issues presented by a case. *Merrill v. Griswold's, Inc.*, 270 Neb. 458, 703 N.W.2d 893 (2005). Omaha Cable argues that the July 11, 2006, order was not a final order and that thus, the review panel lacked jurisdiction.

[5-7] A party may appeal from a court's order only if the decision is a final, appealable order. *Merrill v. Griswold's, Inc., supra*. Final orders include an order affecting a substantial right made during a special proceeding. See Neb. Rev. Stat. § 25-1902 (Reissue 1995). Special proceedings include workers' compensation cases. See *Pfeil v. State*, 273 Neb. 12, 727 N.W.2d 214 (2007).

The trial court's July 11, 2006, order overruled Heppler's motion to compel payment of temporary total disability benefits and attorney fees and his motion for penalties and attorney fees. The order eliminated Heppler's claims to temporary total disability benefits in excess of 300 weeks, to penalties, and to attorney fees. We conclude the order affected a substantial right and was a final, appealable order.

Entitlement to Temporary Total Disability Benefits.

[8] Omaha Cable contends that § 48-121 provides for a maximum of 300 weeks of payments for temporary total disability. Upon that belief, Omaha Cable ceased payments after paying a lump-sum amount representing the remainder of 300 weeks of payments. We conclude such action was improper for two reasons. First, as a general rule, an employer may not unilaterally terminate a workers' compensation award of indefinite temporary total disability benefits absent a modification of the award of benefits. *Davis v. Crete Carrier Corp., supra*. Second,

as discussed below, Heppler's entitlement to temporary total disability benefits is not limited to 300 weeks.

Section 48-121 states in part:

> The following schedule of compensation is hereby established for injuries resulting in disability:
>
> (1) For total disability, the compensation during such disability shall be sixty-six and two-thirds percent of the wages received at the time of injury, but such compensation shall not be more than the maximum weekly income benefit specified in section 48-121.01 nor less than the minimum weekly income benefit specified in section 48-121.01, except that if at the time of injury the employee receives wages of less than the minimum weekly income benefit specified in section 48-121.01, then he or she shall receive the full amount of such wages per week as compensation. Nothing in this subdivision shall require payment of compensation after disability shall cease.
>
> (2) For disability partial in character, except the particular cases mentioned in subdivision (3) of this section, the compensation shall be sixty-six and two-thirds percent of the difference between the wages received at the time of the injury and the earning power of the employee thereafter, but such compensation shall not be more than the maximum weekly income benefit specified in section 48-121.01. This compensation shall be paid during the period of such partial disability but not beyond three hundred weeks. Should total disability be followed by partial disability, the period of three hundred weeks mentioned in this subdivision shall be reduced by the number of weeks during which compensation was paid for such total disability.

The only reference to 300 weeks is found in § 48-121(2), which addresses partial disability, and there is no similar limitation in § 48-121(1), the subsection governing total disability. To the extent Omaha Cable may be arguing that when the statutes are read together the 300-week limitation should be read into § 48-121(1), we reject such an assertion. For many years, § 48-121(1) mentioned 300 weeks. For example, § 48-121(1) (Reissue 1952) reads in part:

> For the first three hundred weeks of total disability, the compensation shall be [a specified percentage of wages, with the minimum and maximum amounts set forth]. After the first three hundred weeks of total disability, for the remainder of the life of the employee, he shall receive [a specified percentage of wages, with the minimum and maximum amounts set forth]. Nothing in this subdivision shall require payment of compensation after disability shall cease. Should partial disability be followed by total disability, the period of three hundred weeks mentioned in this subdivision of this section shall be reduced by the number of weeks during which compensation was paid for partial disability.

Section 48-121(2) (Reissue 1952), on the other hand, is substantially the same as the current version: the only difference is that the older statute provided for maximum compensation of $26 per week. The striking of the 300-week language from § 48-121(1), see 1973 Neb. Laws, L.B. 193, but not from § 48-121(2), evidences the Legislature's intent to eliminate such limitation upon benefits for total disability.

[9-11] Omaha Cable argues "a fair and reasonable interpretation is that §48-121(1) addresses the issue of permanent total disability only." Brief for appellant at 9. Appellate courts give statutory language its plain and ordinary meaning and will not resort to interpretation to ascertain the meaning of statutory words which are plain, direct, and unambiguous. *Knapp v. Village of Beaver City*, 273 Neb. 156, 728 N.W.2d 96 (2007). It is not within the province of a court to read a meaning into a statute that is not warranted by the language; neither is it within the province of a court to read anything plain, direct, and unambiguous out of a statute. *State v. Warriner*, 267 Neb. 424, 675 N.W.2d 112 (2004). If the language of a statute is clear, the words of such statute are the end of any judicial inquiry regarding its meaning. *Turco v. Schuning*, 271 Neb. 770, 716 N.W.2d 415 (2006). The language of § 48-121(1) (Reissue 2004) is clear, and we will not read the word "permanent" into the statute when such word is plainly not there.

[12-14] "Temporary" and "permanent" refer to the duration of disability, while "total" and "partial" refer to the degree or

extent of the diminished employability or loss of earning capacity. *Rodriguez v. Hirschbach Motor Lines*, 270 Neb. 757, 707 N.W.2d 232 (2005). Temporary total disability benefits are a species of total disability benefits. See *Sheldon-Zimbelman v. Bryan Memorial Hosp.*, 258 Neb. 568, 604 N.W.2d 396 (2000). Because the disability at issue in the instant case is a temporary total disability, § 48-121(1) is applicable. We hold that the 300-week limitation found in § 48-121(2) does not apply to benefits for temporary total disability awarded under § 48-121(1).

[15,16] Temporary disability ordinarily continues until the claimant is restored so far as the permanent character of his or her injuries will permit. *Rodriguez v. Hirschbach Motor Lines, supra*. Compensation for temporary disability ceases as soon as the extent of the claimant's permanent disability is ascertained. *Id.* The initial award ordered Omaha Cable to pay $487 per week in temporary total disability "for so long as [Heppler] remains temporarily totally disabled." At the June 14, 2006, hearing, Heppler's counsel informed the trial court that Heppler was still temporarily totally disabled, and there is no evidence to the contrary. Accordingly, under the initial award, Heppler's entitlement to temporary total disability benefits continues.

Award of Attorney Fees.

[17] The review panel awarded Heppler $2,500 in attorney fees because he appealed and received an increase in the award. Neb. Rev. Stat. § 48-125(2) (Cum. Supp. 2006) provides in pertinent part:

> If the employee files an application for a review before the compensation court from an order of a judge of the compensation court denying an award and obtains an award or if the employee files an application for a review before the compensation court from an award of a judge of the compensation court when the amount of compensation due is disputed and obtains an increase in the amount of such award, the compensation court may allow the employee a reasonable attorney's fee to be taxed as costs against the employer for such review, and the Court of Appeals or Supreme Court may in like manner allow the employee a reasonable sum as attorneys fees for the proceedings in the Court of Appeals or Supreme Court.

Omaha Cable argues that the award of attorney fees was improper, because "Heppler did not obtain an increase in the amount of such award, but rather was entitled to continue to receive the identical benefits originally awarded." Brief for appellant at 11-12. Although we agree that the effect of the review panel's order was to continue the obligations under the initial award, Omaha Cable's argument ignores the trial court's order from which Heppler filed the application for review.

On July 11, 2006, the trial court overruled Heppler's motion to compel payment of temporary total disability benefits and attorney fees and his motion for penalties and attorney fees. The court's order effectively limited Heppler's entitlement to temporary total disability benefits to 300 weeks. Heppler filed an application for review from that order, and the review panel determined that there was no such limitation on the number of weeks that payments are to be made and that Omaha Cable continued to be under the initial award's obligation to pay Heppler temporary total disability benefits. Because Heppler obtained an increase on review, he was entitled to attorney fees. This assignment of error lacks merit.

CONCLUSION

We conclude that under § 48-121(1), a worker's entitlement to temporary total disability benefits is not capped at 300 weeks. We affirm the decision of the review panel in all respects.

AFFIRMED.

JAMES E. DINGES, APPELLEE, V.
CINDY E. DINGES, APPELLANT.
743 N.W.2d 662

Filed January 2, 2008. No. A-06-239.

1. **Due Process: Appeal and Error.** Determination of whether procedures afforded an individual comport with constitutional requirements for procedural due process presents a question of law, regarding which an appellate court is obligated to reach its own conclusions independent of those reached by the trial court.
2. **Judges: Recusal: Appeal and Error.** A motion to recuse for bias or partiality is initially entrusted to the discretion of the trial court, and the trial court's ruling will be affirmed absent an abuse of that discretion.

3. **Property Division: Appeal and Error.** The division of property is entrusted to the discretion of the trial judge and will be reviewed de novo on the record and affirmed in the absence of an abuse of discretion.
4. **Courts.** Generally, Nebraska state courts are not bound by the federal rules governing civil procedure in federal courts.
5. **Appeal and Error.** To be considered by an appellate court, alleged error must be both specifically assigned and specifically argued in the brief of the party assigning the error.
6. **Rules of the Supreme Court: Records: Evidence.** Neb. Ct. R. of Prac. 5A(1) (rev. 2006) requires the official court reporter to include in the verbatim record of any trial or other evidentiary hearing the evidence offered at such trial or hearing.
7. **Judges: Recusal.** A trial judge should recuse himself or herself when a litigant demonstrates that a reasonable person who knew the circumstances of the case would question the judge's impartiality under an objective standard of reasonableness, even though no actual bias or prejudice is shown.
8. **Divorce: Property Division.** Under the analytical approach, compensation for an injury that a spouse has or will receive for pain, suffering, disfigurement, disability, or loss of postdivorce earning capacity should not equitably be included in the marital estate, but compensation for past wages, medical expenses, and other items that compensate for the diminution of the marital estate should equitably be included in the marital estate because they properly replace losses of property created by the marital partnership.
9. **Federal Acts: Social Security: Assignments.** The anti-assignment section of the Social Security Act, 42 U.S.C. § 407(a) (2000), states that the right of any person to any future payment under that subchapter shall not be transferable or assignable, at law or in equity, and that none of the moneys paid or payable or rights existing under that subchapter shall be subject to execution, levy, attachment, garnishment, or other legal process, or to the operation of any bankruptcy or insolvency law.
10. **Constitutional Law: Federal Acts: Social Security: Divorce: Property Division.** The anti-assignment clause of the Social Security Act and the Supremacy Clause of the U.S. Constitution prohibit a direct offset to adjust for disproportionate Social Security benefits in the property division of a dissolution decree.
11. ____: ____: ____: ____: ____. While an offset of a Social Security award is prohibited by the anti-assignment clause of the Social Security Act and the Supremacy Clause of the U.S. Constitution, a court may properly consider a spouse's Social Security award in equitably dividing the marital property.
12. **Divorce: Appeal and Error.** Appeals in domestic relations matters are heard de novo on the record, and thus, an appellate court is empowered to enter the order which should have been made as reflected by the record.
13. **Property Division.** Although the division of property is not subject to a precise mathematical formula, the general rule is to award a spouse one-third to one-half of the marital estate, the polestar being fairness and reasonableness as determined by the facts of each case.

Appeal from the District Court for Dakota County: KURT RAGER, County Judge. Affirmed as modified.

Cindy E. Dinges, pro se.

Dennis R. Ringgenberg and Daniel L. Hartnett, of Crary, Huff, Inkster, Sheehan, Ringgenberg, Hartnett & Storm, P.C., for appellee.

INBODY, Chief Judge, and CARLSON and CASSEL, Judges.

CASSEL, Judge.

INTRODUCTION

Cindy E. Dinges appeals from the decree dissolving her marriage to James E. Dinges. We find no merit in Cindy's assignments that the trial court erred in denying her due process, in making findings not supported by the evidence, and in not recusing itself. However, we conclude that the trial court erred in treating traceable proceeds of Cindy's lump-sum Social Security disability award as a marital asset, contrary to the anti-assignment clause of the Social Security Act. We therefore modify the trial court's division of property.

BACKGROUND

Cindy and James married on October 23, 1998. No children were born to the marriage. On July 20, 2004, James filed a petition for dissolution. On July 27, Cindy moved from the marital home.

At the time of the marriage, Cindy worked as a union pipefitter. She finished working for her employer on April 30, 2000, and took an honorable withdrawal from the union on August 1. James testified that Cindy worked full time until toward the end of 2000, when she had an appendicitis attack, underwent some surgeries, and was laid off. Cindy applied for Social Security disability benefits. A "Notice of Decision - Fully Favorable" dated August 16, 2004, informed Cindy that the Social Security Administration had decided her case. A notice of award stated that Cindy's first payment was for $27,170 for the money she was due through September 2004 and that she would then receive $632 per month. The notice of award stated that the

administration found Cindy became disabled on December 3, 2000, that she had to be disabled for 5 full calendar months in a row before she was entitled to benefits, and that Cindy's first month of entitlement to benefits was June 2001.

In February 2005, Cindy purchased a modular home with a cash value of $54,000. She made a downpayment of $27,000, using the "Social Security back pay."

The trial court determined that Cindy's lump-sum Social Security disability award represented benefits which were accrued during the marriage and that the award should be considered in equitably dividing the marital estate. Because Cindy used the proceeds from the award to purchase the modular home, the court stated that the modular home was part of the marital estate. The court proceeded to equitably distribute the marital assets and debts.

Cindy timely appeals.

ASSIGNMENTS OF ERROR

Cindy alleges, restated, that the court erred in (1) denying her due process by forcing her to go to trial without a final pretrial conference, (2) making factual findings unsupported by the evidence, (3) finding no basis for recusal, and (4) classifying her lump-sum Social Security disability award as marital property and awarding one-half of its value to James.

STANDARD OF REVIEW

[1] Determination of whether procedures afforded an individual comport with constitutional requirements for procedural due process presents a question of law, regarding which an appellate court is obligated to reach its own conclusions independent of those reached by the trial court. *Conn v. Conn*, 13 Neb. App. 472, 695 N.W.2d 674 (2005).

[2] A motion to recuse for bias or partiality is initially entrusted to the discretion of the trial court, and the trial court's ruling will be affirmed absent an abuse of that discretion. *Gibilisco v. Gibilisco*, 263 Neb. 27, 637 N.W.2d 898 (2002).

[3] The division of property is entrusted to the discretion of the trial judge and will be reviewed de novo on the record and

affirmed in the absence of an abuse of discretion. *Liming v. Liming*, 272 Neb. 534, 723 N.W.2d 89 (2006).

ANALYSIS

Due Process.

[4] Cindy argues that she was denied due process by the trial court's denying her a pretrial conference, in violation of Fed. R. Civ. P. 26(f). Generally, Nebraska state courts are not bound by the federal rules governing civil procedure in federal courts. See Fed. R. Civ. P. 1 (federal rules govern procedure in U.S. district courts). Nebraska has not adopted a rule similar to the federal rule 26(f), and Neb. Ct. R. of Dist. Ct. Pretrial Proc. (rev. 2000) states only that "the court may in its discretion direct the attorneys for the parties to appear before it for a conference to consider" certain issues. Further, the court held a pretrial conference on November 5, 2004, which Cindy's then counsel attended. The court's decision not to hold another pretrial conference or a settlement conference after Cindy began handling her own representation does not amount to a denial of due process or an abuse of the trial court's discretion. This assignment of error is without merit.

Factual Findings.

Another of Cindy's assignments of error broadly questions whether the trial court erred in making its findings contained in the decree "[w]hen [i]ts [f]indings [w]ere [n]ot [b]ased [o]n [e]vidence [a]dduced [a]t [t]rial." Brief for appellant at 2.

[5] She argues that the court erred in dividing the marital assets and debts and contends that the court based its findings on exhibits that were "allowed into evidence against [her] timely objections and against the Nebraska Rules of Evidence." *Id.* at 22. To the extent Cindy argues the court erred in receiving evidence over her objections or in dividing the marital estate, such arguments are not encompassed by her assignment of error and we do not consider them. See *Bellino v. McGrath North*, 274 Neb. 130, 738 N.W.2d 434 (2007) (to be considered by appellate court, alleged error must be both specifically assigned and specifically argued in brief of party assigning error).

[6] Cindy argues that the values used by the trial court were based on an exhibit offered by James showing values of property, which exhibit was not received into evidence "[b]ut curiously . . . was made part of the bill of exceptions after trial." Brief for appellant at 23 (emphasis omitted). Of course, Neb. Ct. R. of Prac. 5A(1) (rev. 2006) requires the official court reporter to include in the verbatim record of any "trial or other evidentiary hearing" the "evidence offered" at such trial or hearing. Thus, there is nothing "curious" about the presence of the exhibit within the bill of exceptions. The rule requires that an exhibit offered at trial but not received by the trial court be included in the record in order to allow an appellate court—where an alleged error in refusing to receive the exhibit is properly raised in an appeal—to effectively review the court's decision. See Neb. Rev. Stat. § 27-103(1)(b) (Reissue 1995). The pertinent question, however, is whether, in deciding the issues, the trial court expressly relied on the exhibit which the court had refused to receive. We have reviewed the court's decree, including extensive findings of fact and conclusions of law, and find no indication that the values used by the court were derived from the refused exhibit. We conclude that the values used by the trial court are supported by other evidence which was received at trial.

Recusal.

On November 7, 2005, Cindy filed a "Motion to Recuse or, in the Alternative[,] Motion for Disqualification." She alleged that she had "sufficient reason to believe" that the trial judge was biased against Cindy because of the judge's actions in a telephonic hearing on October 28 where the judge "ridiculed" Cindy and "belittled her actions[,] all the while praising [James'] [a]ttorney for his alleged 'correctness.'" Cindy further alleged that the judge showed "an obvious bias" toward James and his position during the telephonic hearing. Cindy stated that she filed a complaint against the judge with the "Nebraska Judicial review Committee." On November 18, the court entered an order stating that it "finds that there is no basis in fact for this judge to recuse or disqualify himself from hearing the within matter."

[7] A trial judge should recuse himself or herself when a litigant demonstrates that a reasonable person who knew the circumstances of the case would question the judge's impartiality under an objective standard of reasonableness, even though no actual bias or prejudice is shown. *Gibilisco v. Gibilisco*, 263 Neb. 27, 637 N.W.2d 898 (2002). We have reviewed the transcription of the October 28, 2005, hearing, and find nothing in the court's statements showing bias. While a more complete explanation of the court's rulings might have been helpful to this litigant, we find no abuse of discretion in the denial of the motion. This assignment of error lacks merit.

Social Security Disability Award.

Cindy argues that the court erred in classifying her lump-sum Social Security award as marital property. The trial court, using an "analytical approach," determined that Cindy's Social Security award represented benefits accrued during the marriage and should be included in the marital estate. The court then stated that because Cindy used the proceeds from the Social Security disability award to purchase the modular home, the modular home was part of the marital estate.

[8] In *Parde v. Parde*, 258 Neb. 101, 602 N.W.2d 657 (1999), the Nebraska Supreme Court adopted the analytical approach in determining whether proceeds from a Federal Employers' Liability Act personal injury settlement should be included in the marital estate. The *Parde* court explained that "[i]n the analytical approach, courts analyze the nature and underlying reasons for the compensation." 258 Neb. at 108-09, 602 N.W.2d at 662. The *Parde* court held that compensation for an injury that a spouse has or will receive for pain, suffering, disfigurement, disability, or loss of postdivorce earning capacity should not equitably be included in the marital estate, but compensation for past wages, medical expenses, and other items that compensate for the diminution of the marital estate should equitably be included in the marital estate because they properly replace losses of property created by the marital partnership. We have little difficulty agreeing with the trial court that under the analytical approach, Cindy's lump-sum award would be included in the marital estate because it was

compensation for the diminution of the marital estate. The problem presented by this case, which problem the trial court did not address, is that Cindy's lump-sum award was composed of Social Security benefits.

[9] The anti-assignment section of the Social Security Act, 42 U.S.C. § 407(a) (2000), states:

> The right of any person to any future payment under this subchapter shall not be transferable or assignable, at law or in equity, and none of the moneys paid or payable or rights existing under this subchapter shall be subject to execution, levy, attachment, garnishment, or other legal process, or to the operation of any bankruptcy or insolvency law.

In *Philpott v. Essex County Welfare Board*, 409 U.S. 413, 417, 93 S. Ct. 590, 34 L. Ed. 2d 608 (1973), the U.S. Supreme Court described § 407(a) as "impos[ing] a broad bar against the use of any legal process to reach all social security benefits." However, in 1975, Congress declared that Social Security benefits were subject to legal process "to enforce the legal obligation of the individual to provide child support or alimony." 42 U.S.C. § 659(a) (2000). "Alimony" does not include "any payment or transfer of property or its value by an individual to the spouse or a former spouse of the individual in compliance with any community property settlement, equitable distribution of property, or other division of property between spouses or former spouses." § 659(i)(3)(B)(ii).

In *Webster v. Webster*, 271 Neb. 788, 716 N.W.2d 47 (2006), the Nebraska Supreme Court considered whether the husband, who participated in a public employee retirement fund in lieu of Social Security participation, was entitled to an offset or other compensation for the wife's Social Security benefits when dividing marital property in a dissolution decree. The *Webster* court stated, "Courts generally agree that § 407(a) preempts state law that would authorize distribution of Social Security benefits, and that Social Security benefits themselves are not subject to direct division in a dissolution proceeding." 271 Neb. at 796, 716 N.W.2d at 54. The *Webster* court cited to a number of cases where state courts considered the U.S. Supreme Court's decision in *Hisquierdo v. Hisquierdo*, 439 U.S. 572, 99 S. Ct. 802,

59 L. Ed. 2d 1 (1979), as instructing them that Social Security is not subject to an indirect adjustment through offset.

> In *Hisquierdo*, the U.S. Supreme Court held that in dissolution proceedings, a wife did not have a community property interest in her husband's expectation of receiving railroad retirement benefits. The Court, in so holding, expressly pointed to the similarities between the railroad retirement benefits and benefits under the Social Security Act, including the fact that the laws providing for both forms of benefits specifically prohibited the assignment of the benefits through garnishment, attachment, or other legal process. . . .
>
> The Court concluded that Congress had decided upon a delicate statutory balance in which it fixed an amount it thought appropriate to support an employee's old age and to encourage the employee to retire. In deciding how finite funds were to be allocated, Congress chose not to allow diminution of that fixed amount by the spouse for whom the fund was not designed. The Social Security Act provides a specific limited avenue for divorced persons to obtain a share of the former spouse's benefits. See 42 U.S.C. § 402(b)(1)(A) through (D), and (c)(1)(A) through (D) (2000).
>
> The Court in *Hisquierdo* specifically rejected the wife's argument that even if a direct allocation of her former husband's railroad retirement benefit would be contrary to the statutory benefit scheme, she should still be entitled to an offsetting award of presently available community property to compensate her for her interest in the expected benefits. The court explained: "An offsetting award, however, would upset the statutory balance and impair petitioner's economic security just as surely as would a regular deduction from his benefit check." *Hisquierdo v. Hisquierdo*, 439 U.S. 572, 588, 99 S. Ct. 802, 59 L. Ed. 2d 1 (1979).

Webster v. Webster, 271 Neb. at 797-98, 716 N.W.2d at 54-55.

[10] The *Webster* court stated that the weight of authority concluded an offset of Social Security benefits was prohibited, but that most of those courts, especially those in equitable

division states as compared to community property states, "have not found a more generalized consideration of Social Security benefits to be an impermissible factor in the overall scheme when making a property division." 271 Neb. at 798, 716 N.W.2d at 55. The *Webster* court ultimately concluded that "the anti-assignment clause of the Social Security Act and the Supremacy Clause of the U.S. Constitution prohibit a direct offset to adjust for disproportionate Social Security benefits in the property division of a dissolution decree." *Webster v. Webster*, 271 Neb. 788, 800, 716 N.W.2d 47, 56 (2006).

The *Webster* court's discussion of *Marriage of Zahm*, 138 Wash. 2d 213, 978 P.2d 498 (1999), and *Neville v. Neville*, 99 Ohio St. 3d 275, 791 N.E.2d 434 (2003), provides some guidance on how to dispose of the issue before us.

> The court in *Marriage of Zahm* . . . concluded that where the trial court neither computed a formal calculation of the value of the husband's Social Security benefits nor offset a formal numerical valuation into the court's property division via a specific counterbalancing property award to the wife, the reasoning in *Hisquierdo* did not apply. The court explained that the antireassignment clause of the Social Security Act did not preclude the trial court from considering a spouse's Social Security income "within the more elastic parameters of the court's power to formulate a just and equitable division of the parties' marital property." 138 Wash. 2d at 222, 978 P.2d at 502. As described by the court in *Neville*, "[a]lthough a party's Social Security benefits cannot be divided as a marital asset, those benefits may be considered by the trial court under the catchall category as a relevant and equitable factor in making an equitable distribution." *Neville v. Neville*, 99 Ohio St. 3d at 278, 791 N.E.2d at 437. This is especially true when "'a spouse's social security contributions and ultimate benefits have been increased by the work of the other spouse, and . . . a nonemployed spouse loses spending power after a divorce through the inability to use the other spouse's social security benefits.' [Quoting] 2A Social Security Law and Practice (Flaherty & Sigillo,

> Eds., 1994), Section 34:67." 99 Ohio St. 3d at 278, 791 N.E.2d at 437.

Webster v. Webster, 271 Neb. at 799, 716 N.W.2d at 55-56.

In *In re Marriage of Knipp*, 15 Kan. App. 2d 494, 809 P.2d 562 (1991), a Kansas appellate court reached a similar conclusion. In that case, the husband received a lump-sum Social Security disability benefit of approximately $12,800 during the marriage for a disability suffered prior to the marriage, and he invested the payment in an interest-bearing account. At the time of the divorce, $9,200 remained in the account, and the trial court ordered $3,000 from the account set over to the wife as part of the property division. Citing to *Philpott v. Essex County Welfare Board*, 409 U.S. 413, 93 S. Ct. 590, 34 L. Ed. 2d 608 (1973), the Kansas Court of Appeals stated that the U.S. Supreme Court had determined that 42 U.S.C. § 407(a) applied to benefits received and deposited in a savings account, stating, "Writing for a unanimous court, Justice Douglas reasoned that retroactive benefits placed in an account retained the quality of 'moneys' within the scope of 42 U.S.C. § 407." *In re Marriage of Knipp*, 15 Kan. App. 2d at 495, 809 P.2d at 563. The Kansas court concluded that the trial court erred in setting aside a portion of the husband's lump-sum Social Security benefits but stated that "the anti-assignment statute does not prohibit a court from considering the value of a lump sum social security disability award in dividing the remaining marital property." *Id.* at 495-96, 809 P.2d at 564. The Kansas court then reversed, and remanded for reconsideration of the property division, stating that "no single asset may be viewed independently in adjudicating a property settlement." *Id.* at 496, 809 P.2d at 564.

In *Olsen v. Olsen*, 169 P.3d 765, 768 (Utah App. 2007), the Court of Appeals of Utah held that

> Congress has preempted state trial courts from including social security benefits as a marital asset; however, trial courts may consider social security benefits in relation to all joint and separate marital assets in seeking to ensure that "property be fairly divided between the parties, given their contributions during the marriage and their circumstances at the time of the divorce."

The *Olsen* court concluded that the division of property needed to be reconsidered on remand.

[11] We conclude that the trial court erred in stating that it "should consider the lump sum award received by C[indy] as a marital asset subject to division in this dissolution proceeding" and then including the modular home, purchased post separation with the Social Security funds, in the marital estate. The Nebraska Supreme Court's holding in *Webster v. Webster*, 271 Neb. 788, 716 N.W.2d 47 (2006), precludes such treatment. However, we must also decide the issue discussed but not reached by the *Webster* court. We hold that while an offset of a Social Security award is prohibited by the anti-assignment clause of the Social Security Act and the Supremacy Clause of the U.S. Constitution, a court may properly consider a spouse's Social Security award in equitably dividing the marital property. We rely upon the "weight of authority" noted by the *Webster* court. See *id*. at 798, 716 N.W.2d at 55. Of course, such award is only one of many factors which we consider in our de novo review of the division of marital property.

[12,13] Appeals in domestic relations matters are heard de novo on the record, and thus, an appellate court is empowered to enter the order which should have been made as reflected by the record. *Foster v. Foster*, 266 Neb. 32, 662 N.W.2d 191 (2003). We therefore modify the decree to exclude the Social Security award, traceable to the modular home, as part of the marital estate. The trial court's decree showed the net marital estate to be $41,933, and it awarded Cindy a net value of $21,060.52 of the marital estate and James a net value of $20,872.48. Eliminating from the marital estate the $27,000 traceable to the modular home leaves a net marital estate of $14,933. Although the division of property is not subject to a precise mathematical formula, the general rule is to award a spouse one-third to one-half of the marital estate, the polestar being fairness and reasonableness as determined by the facts of each case. *Millatmal v. Millatmal*, 272 Neb. 452, 723 N.W.2d 79 (2006). A division of one-third to one-half of this marital estate would be to award a spouse between approximately $4,978 and $7,467. We accept the trial court's distribution of the assets and liabilities, but, to equitably divide the marital estate, we order

James to pay $11,000 to be distributed to Cindy. With such payment, Cindy will have received $5,060.52 of the marital estate, and James' share will be reduced to $9,872.48.

CONCLUSION

We conclude that the court did not abuse its discretion in denying Cindy a further pretrial conference or a settlement conference, in the factual findings it made in the decree, or in declining to recuse itself. However, we conclude that the court erred in finding Cindy's lump-sum Social Security disability award to be a marital asset subject to division. We therefore modify the court's decree to equitably divide the marital estate after eliminating from the marital estate the $27,000 in Social Security disability benefits traceable to the modular home.

AFFIRMED AS MODIFIED.

STATE OF NEBRASKA, APPELLEE, V.
WILLIAM P. SUTTON, APPELLANT.
741 N.W.2d 713

Filed January 2, 2008. No. A-06-1297.

SUPPLEMENTAL OPINION

Appeal from the District Court for Sheridan County: PAUL D. EMPSON, Judge. Supplemental opinion: Former opinion modified. Motion for rehearing overruled.

Paul Wess for appellant.

Jon Bruning, Attorney General, and George R. Love for appellee.

SIEVERS, CARLSON, and CASSEL, Judges.

PER CURIAM.

This matter is before the court upon the motion for rehearing of the State regarding our opinion in *State v. Sutton, ante* p. 185, 741 N.W.2d 713 (2007). While we overrule the motion for rehearing, we modify our opinion as follows:

In that portion of the opinion designated the "Analysis," we strike the following language from the opinion, *id.* at 193, 741 N.W.2d at 721:

> [15] Intent is not an element of first degree sexual assault as defined by § 28-319, one of the offenses with which Sutton was charged. See *State v. Sanchez*, 257 Neb. 291, 597 N.W.2d 361 (1999). Intent, however, must be proved with respect to the second degree assault charge.

We replace the stricken language with the following:

> [15] First degree sexual assault under § 28-319(1)(a) is a general intent crime. *State v. Koperski*, 254 Neb. 624, 578 N.W.2d 837 (1998). Intent must be proven with respect to the second degree assault charge.

We also withdraw the language of syllabus point 15, and we replace it with the following:

> **Sexual Assault: Intent.** First degree sexual assault under Neb. Rev. Stat. § 28-319(1)(a) (Reissue 1995) is a general intent crime.

The remainder of the opinion shall remain unmodified.

FORMER OPINION MODIFIED.
MOTION FOR REHEARING OVERRULED.

SANTOS A. VILLANUEVA, APPELLANT, V. CITY OF SOUTH SIOUX CITY, A POLITICAL SUBDIVISION, APPELLEE.

743 N.W.2d 771

Filed January 8, 2008. No. A-06-321.

1. **Summary Judgment.** Summary judgment is proper when the pleadings and evidence admitted at the hearing disclose no genuine issue as to any material fact or as to the ultimate inferences that may be drawn from those facts and that the moving party is entitled to judgment as a matter of law.
2. **Summary Judgment: Appeal and Error.** In reviewing a summary judgment, an appellate court views the evidence in a light most favorable to the party against whom the judgment is granted and gives such party the benefit of all reasonable inferences deducible from the evidence.
3. **Political Subdivisions Tort Claims Act.** The Political Subdivisions Tort Claims Act is the exclusive means by which a tort claim may be maintained against a political subdivision or its employees.

4. **Political Subdivisions Tort Claims Act: Jurisdiction.** While not a jurisdictional prerequisite, the filing or presentment of a claim to the appropriate political subdivision is a condition precedent to commencement of a suit under the Political Subdivisions Tort Claims Act.
5. **Political Subdivisions Tort Claims Act: Notice.** The written claim required by the Political Subdivisions Tort Claims Act notifies a political subdivision concerning possible liability for its relatively recent act or omission, provides an opportunity for the political subdivision to investigate and obtain information about its allegedly tortious conduct, and enables the political subdivision to decide whether to pay the claimant's demand or defend the litigation predicated on the claim made.
6. ____: ____. The notice requirements for a claim filed pursuant to the Political Subdivisions Tort Claims Act are liberally construed so that one with a meritorious claim may not be denied relief as the result of some technical noncompliance with the formal prescriptions of the act.
7. ____: ____. Substantial compliance with the statutory provisions pertaining to a claim's content supplies the requisite and sufficient notice to a political subdivision in accordance with Neb. Rev. Stat. § 13-905 (Reissue 1997) when the lack of compliance has caused no prejudice to the political subdivision.

Appeal from the District Court for Dakota County: WILLIAM BINKARD, Judge. Reversed and remanded for further proceedings.

Steven H. Howard, of Dowd, Howard & Corrigan, L.L.C., for appellant.

Thomas J. Culhane, of Erickson & Sederstrom, P.C., for appellee.

INBODY, Chief Judge, and CARLSON and CASSEL, Judges.

CARLSON, Judge.

INTRODUCTION

Santos A. Villanueva brought a negligence action against the City of South Sioux City (the City) following an automobile accident with an employee of the City. The district court for Dakota County sustained the City's motion for summary judgment and overruled Villanueva's motion for partial summary judgment. Villanueva appeals. At issue in this case is whether Villanueva complied with the notice requirements of the Political Subdivisions Tort Claims Act (Tort Claims Act), Neb. Rev. Stat. §§ 13-901 to 13-926 (Reissue 1997 & Cum. Supp. 2002).

BACKGROUND

On September 26, 2003, Villanueva filed an amended complaint against the City, alleging that he was injured on February 25, 2002, as a result of an automobile accident with Paul Black, an employee of the City. The amended complaint alleged that the accident was caused by Black's negligence and that at the time of the accident, Black was operating a vehicle owned by the City and was acting in the course and scope of his employment with the City. Villanueva claimed that as a result of the injuries he sustained in the accident, he has incurred medical expenses in excess of $100,000 and has and will continue to suffer physical pain, mental suffering, loss of enjoyment of life, loss of income, scarring, and disfigurement. Villanueva also alleged that he timely filed a claim with the City pursuant to the Tort Claims Act and that he has fully complied with the Tort Claims Act.

On October 20, 2003, Villanueva filed a motion for partial summary judgment, and on November 3, the City filed a motion for summary judgment. Both motions were made in regard to the same issue—whether Villanueva complied with the notice requirements of the Tort Claims Act. On June 4, 2004, the trial court found that Villanueva had complied with the notice requirements of the Tort Claims Act and sustained Villanueva's motion for partial summary judgment and overruled the City's motion for summary judgment.

On December 27, 2005, the City filed a motion asking the trial court to reconsider its ruling on Villanueva's motion for partial summary judgment and the City's motion for summary judgment. On February 14, 2006, a hearing was held on the motion to reconsider. The evidence at the hearing on the motion to reconsider included a letter from Villanueva's attorney dated April 15, 2002, addressed to the city clerk, city attorney, and city administrator. The letter stated as follows:

> Please be advised that we represent . . . Villanueva who received serious personal injuries on February 25, 2002. . . . Villanueva was traveling north bound on 3rd Avenue at its intersection with W. 7th Street, when a pick-up truck owned by the City . . . and driven by . . . Black, entered the intersection and struck the driver's side of . . .

> Villanueva. . . . Villanueva has suffered personal injury as a result of this collision. Our investigation of the accident reveals that the personal injury suffered by . . . Villanueva was solely and proximately caused by the negligence of the City.
>
> This letter shall serve as our notice to you under the Political Subdivision[s] Tort Claims Act, Neb. Rev. Stat. Sec. 13-902 et. seq. for the personal injuries sustained by . . . Villanueva as a result of said occurrence. Would you kindly request the attorney responsible for the handling of this claim to contact me.

The evidence also included a January 7, 2003, letter from Villanueva's new counsel to the City's city clerk, city attorney, and city administrator which advised that he had been retained to represent Villanueva in his "injury auto accident" with a vehicle owned by the City and that it was Villanueva's position that the City was at fault. The January 7 letter also referenced the April 15, 2002, letter, included a copy of such letter, and asked whether "a decision on this claim" had been made.

On February 22, 2006, the trial court entered an order finding that the two letters, taken together or separately, did not satisfy the requirements of § 13-905. The trial court sustained the City's motion for summary judgment, overruled Villanueva's motion for partial summary judgment, and dismissed Villanueva's amended complaint. Villanueva appeals.

ASSIGNMENTS OF ERROR

Villanueva assigns that the trial court erred in (1) sustaining the City's motion for summary judgment and (2) overruling Villanueva's motion for partial summary judgment.

STANDARD OF REVIEW

[1,2] Summary judgment is proper when the pleadings and evidence admitted at the hearing disclose no genuine issue as to any material fact or as to the ultimate inferences that may be drawn from those facts and that the moving party is entitled to judgment as a matter of law. *Alston v. Hormel Foods Corp.*, 273 Neb. 422, 730 N.W.2d 376 (2007); *City of Lincoln v. Hershberger*, 272 Neb. 839, 725 N.W.2d 787 (2007). In

reviewing a summary judgment, an appellate court views the evidence in a light most favorable to the party against whom the judgment is granted and gives such party the benefit of all reasonable inferences deducible from the evidence. *Id.*

ANALYSIS

[3] Villanueva assigns that the trial court erred in granting summary judgment in favor of the City on the ground that he failed to comply with the notice requirements of the Tort Claims Act, specifically § 13-905. The Tort Claims Act is the exclusive means by which a tort claim may be maintained against a political subdivision or its employees. *Jessen v. Malhotra*, 266 Neb. 393, 665 N.W.2d 586 (2003); *Keller v. Tavarone*, 265 Neb. 236, 655 N.W.2d 899 (2003). In the instant case, it is undisputed that the City is a political subdivision subject to the Tort Claims Act.

[4] While not a jurisdictional prerequisite, the filing or presentment of a claim to the appropriate political subdivision is a condition precedent to commencement of a suit under the Tort Claims Act. *Jessen v. Malhotra, supra*; *Keller v. Tavarone, supra.* Section 13-920(1) provides, in relevant part:

> No suit shall be commenced against any employee of a political subdivision for money on account of damage to or loss of property or personal injury to or the death of any person caused by any negligent or wrongful act or omission of the employee while acting in the scope of his or her office or employment . . . *unless a claim has been submitted in writing to the governing body of the political subdivision within one year after such claim accrued* . . . .

(Emphasis supplied.)

Villanueva's claim for negligence accrued on February 25, 2002. Under § 13-920(1), Villanueva was required to submit a written claim to the appropriate political subdivision by February 25, 2003. He argues that his April 15, 2002, letter and his January 7, 2003, letter were such a claim.

[5] The written claim required by the Tort Claims Act notifies a political subdivision concerning possible liability for its relatively recent act or omission, provides an opportunity for the political subdivision to investigate and obtain information

about its allegedly tortious conduct, and enables the political subdivision to decide whether to pay the claimant's demand or defend the litigation predicated on the claim made. *Jessen v. Malhotra, supra.*

[6,7] The necessary content of a written claim is addressed in § 13-905, which requires that all claims shall be addressed "in writing and shall set forth the time and place of the occurrence giving rise to the claim and such other facts pertinent to the claim as are known to the claimant." The notice requirements for a claim filed pursuant to the Tort Claims Act are liberally construed so that one with a meritorious claim may not be denied relief as the result of some technical noncompliance with the formal prescriptions of the act. *Chicago Lumber Co. v. School Dist. No. 71*, 227 Neb. 355, 417 N.W.2d 757 (1988). Therefore, substantial compliance with the statutory provisions pertaining to a claim's content supplies the requisite and sufficient notice to a political subdivision in accordance with § 13-905, formerly Neb. Rev. Stat. § 23-2404 (Reissue 1983), when the lack of compliance has caused no prejudice to the political subdivision. *Chicago Lumber Co. v. School Dist. No. 71, supra.*

In concluding that the content of Villanueva's two letters, taken together or separately, was insufficient to satisfy the notice requirements of § 13-905, the trial court specifically found that the letters do not make a proper demand of the relief sought to be recovered. The trial court relied on *Jessen v. Malhotra*, 266 Neb. 393, 665 N.W.2d 586 (2003), in making this finding. In *Jessen*, a physician employed by a county medical clinic allegedly misdiagnosed a patient's heart disease. Two days after seeing the physician, the patient died from a myocardial infarction. The patient's widow sent a letter to the physician stating that her husband had been examined by the physician and implying that the physician negligently failed to diagnose her husband's condition, a condition which led to his death. The letter further stated that the physician's misdiagnosis was "'malpractice'" and that the patient's family was "'very angry.'" *Id.* at 395, 665 N.W.2d at 589. The Nebraska Supreme Court concluded that the content of the widow's letter was insufficient to satisfy the requirements of a written claim under

§ 13-905 because it did not make a demand for the satisfaction of any obligation, nor did it convey what relief was sought by the plaintiff. The court found that without a proper demand of the relief sought to be recovered, a written claim fails to accomplish one of its recognized objectives: to allow the political subdivision to decide whether to settle the claimant's demand or defend itself in the course of litigation.

The *Jessen* court cited two other cases with approval in which the Nebraska Supreme Court had construed the predecessor to § 13-905 to require that a written claim make a demand upon a political subdivision for the satisfaction of an obligation. The court first referenced *Peterson v. Gering Irr. Dist.*, 219 Neb. 281, 363 N.W.2d 145 (1985), a case in which the claim failed to meet the "demand" requirement. The purported claim in *Peterson* notified the political subdivision that it "'failed to deliver water by reason of negligence or omission of duties and responsibilities of the [political subdivision]'" and that the plaintiffs would hold it liable for "'whatever damages *may result* as a result of failure to deliver water.'" *Id.* at 283-84, 363 N.W.2d at 147 (emphasis in original). The *Peterson* court noted that the purported claim did not state the amount of damage or loss sustained by the plaintiffs, nor did it allege that such damage or loss had occurred. The court found that the purported claim did not meet the Tort Claims Act's requirements because "it made no demand against the [political subdivision]; rather, it only alerted the district to the possibility of a claim." *Peterson v. Gering Irr. Dist.*, 219 Neb. at 284, 363 N.W.2d at 147.

The court in *Jessen v. Malhotra, supra*, also cited with approval *West Omaha Inv. v. S.I.D. No. 48*, 227 Neb. 785, 420 N.W.2d 291 (1988), as a case in which the claim "passed statutory muster." In *West Omaha Inv.*, the plaintiff sent a letter to a political subdivision stating that pursuant to the Tort Claims Act "'claim is made against [the political subdivision] for the property loss suffered'" by plaintiff as a result of a fire. The letter alleged that the fire loss was caused in part by the political subdivision's negligence—specifically in its failing to furnish the water with which to extinguish the fire. 227 Neb. at 787-88, 420 N.W.2d at 294. In considering whether the letter met the Tort Claims Act's requirements, the *West Omaha Inv.*

court determined that the court in *Peterson v. Gering Irr. Dist., supra*, was mostly concerned that the plaintiffs make an actual demand upon the defendant. It noted that the *Peterson* court emphasized that the questionable language in the plaintiff's claim was "'whatever damages *may result*.'" 227 Neb. at 789, 420 N.W.2d at 294. The Supreme Court found that the letter in *West Omaha Inv.* stated that property loss had occurred and that the defendant was responsible and thus, that the letter satisfied the Tort Claims Act's requirements. The *West Omaha Inv.* court stated, "The letter did not merely alert the defendant to the future 'possibility of a claim' for 'whatever damages may result' as in *Peterson*. Rather, the plaintiff stated that 'claim is made' against the defendant for actual property loss caused in part by the defendant's negligence." 227 Neb. at 790, 429 N.W.2d at 295.

In determining whether the two letters in the present case satisfy the requirements of § 13-905, we also look to *Keating v. Wiese*, 1 Neb. App. 865, 510 N.W.2d 433 (1993). In *Keating*, the plaintiff's attorney sent a letter to a political subdivision notifying it that the attorney was representing the plaintiff in connection with damages sustained when a city bus struck the plaintiff's car. The letter further stated: "We are not making a formal claim at this time, simply because it is impossible to determine the extent of [the plaintiff's] damages." 1 Neb. App. at 867, 510 N.W.2d at 436. The letter also requested a response by the political subdivision's insurance claims adjuster. This court took *Peterson v. Gering Irr. Dist., supra*, and *West Omaha Inv. v. S.I.D. No. 48, supra*, into account in determining whether the plaintiff's letter in *Keating* met the requirements of § 13-905. We concluded that the plaintiff's letter in *Keating* notified the political subdivision that the plaintiff had sustained damages as a result of a collision with a city bus and held that the letter substantially complied with the requirements of the Tort Claims Act. We stated that the political subdivision knew of its possible liability for the recent accident and that the political subdivision was given the opportunity to investigate and obtain information about the accident. We further stated that the political subdivision had the opportunity to decide whether to pay the plaintiff's demand or to defend the litigation predicated on the claim.

Having considered the previously discussed case law, we determine that the instant case is comparable to *West Omaha Inv. v. S.I.D. No. 48*, 227 Neb. 785, 420 N.W.2d 291 (1988), and *Keating v. Wiese, supra*. In both of these cases, the claims satisfied the requirements of § 13-905 because they stated that the plaintiffs had sustained damages as a result of a negligent act by the respective political subdivision. In contrast, the purported claims in *Jessen v. Malhotra*, 266 Neb. 393, 665 N.W.2d 586 (2003), and *Peterson v. Gering Irr. Dist.*, 219 Neb. 281, 363 N.W.2d 145 (1985), did not allege that any damage or loss had occurred. In the present case, the April 15, 2002, letter states that Villanueva suffered personal injuries as a result of the City's negligence. The letter also sets forth the date, location, and circumstances of the event which gave rise to the claim. It further states that the letter serves as notice to the City under the Tort Claims Act and asks that the attorney responsible for handling the "claim" contact Villanueva's attorney. Thus, we conclude that the content of the April 15, 2002, letter alone substantially complies with the requirements of § 13-905. As we concluded in *Keating v. Wiese, supra*, the letter made the City aware of its possible liability for the recent accident, and the City was given the opportunity to investigate and obtain information about the accident. The City had the opportunity to decide whether to pay Villanueva's demand or to defend the litigation predicated on the claim. No assertion is made that the City was in any way prejudiced by the claimed omissions.

We note that given the foregoing analysis, the question of whether a proper claim has been made under the Tort Claims Act is a recurring one. Clearly more care in drafting such claims would eliminate the necessity of litigating the issue.

CONCLUSION

We conclude that Villanueva's April 15, 2002, letter substantially complies with the notice requirements of the Tort Claims Act and, therefore, that the trial court erred in granting summary judgment in favor of the City and in overruling Villanueva's motion for partial summary judgment. We reverse the judgment of the trial court sustaining the City's motion for summary

judgment and remand the cause to the trial court with direction to sustain Villanueva's motion for partial summary judgment.

REVERSED AND REMANDED FOR FURTHER PROCEEDINGS.

JEFFREY L. EDWARDS, APPELLEE AND CROSS-APPELLANT, V. DIANNA Y. EDWARDS, APPELLANT AND CROSS-APPELLEE.

744 N.W.2d 243

Filed January 15, 2008. No. A-06-1350.

1. **Appeal and Error: Waiver.** Whether a party waived his or her right to appellate review is a question of law.
2. **Divorce: Child Custody: Child Support: Property Division: Alimony: Attorney Fees: Appeal and Error.** An appellate court's review in an action for dissolution of marriage is de novo on the record to determine whether there has been an abuse of discretion by the trial judge. This standard of review applies to the trial court's determinations regarding custody, child support, division of property, alimony, and attorney fees.
3. **Appeal and Error.** In a review de novo on the record, an appellate court reappraises the evidence as presented by the record and reaches its own independent conclusions with respect to the matters at issue.
4. **Judges: Words and Phrases.** A judicial abuse of discretion exists when the reasons or rulings of a trial judge are clearly untenable, unfairly depriving a litigant of a substantial right and denying just results in matters submitted for disposition.
5. **Evidence: Appeal and Error.** When the evidence is in conflict, an appellate court considers, and may give weight to, the fact that the trial judge heard and observed the witnesses and accepted one version of the facts rather than another.
6. **Judgments: Waiver: Appeal and Error.** As a general rule, a party who accepts the benefits of a decree waives the right to prosecute an appeal from it.
7. **Divorce: Judgments: Waiver: Appeal and Error.** A spouse who accepts the benefits of a divorce judgment does not waive the right to appellate review under circumstances where the spouse's right to the benefits accepted is conceded by the other spouse, the spouse was entitled as a matter of right to the benefits accepted such that the outcome of the appeal could have no effect on the right to those benefits, or the benefits accepted are pursuant to a severable award which will not be subject to appellate review.
8. **Antenuptial Agreements.** Nebraska's Uniform Premarital Agreement Act authorizes parties contemplating marriage to contract with respect to matters, not in violation of public policy or in violation of statutes imposing criminal penalties, including the rights and obligations of each party in any property of the other, the disposition of property upon divorce, and the modification or elimination of spousal support.

9. ____. A premarital agreement is not enforceable if the party against whom enforcement is sought proves that the party did not execute the agreement voluntarily.
10. **Antenuptial Agreements: Proof.** The party opposing enforcement of a premarital agreement has the burden of proving that the agreement is not enforceable.
11. **Antenuptial Agreements: Evidence.** Evidence of lack of capacity, duress, fraud, and undue influence, as demonstrated by a number of factors uniquely probative of coercion in the premarital context, would be relevant in establishing the involuntariness of a premarital agreement.
12. **Antenuptial Agreements.** The issue of unconscionability of a premarital agreement is a question of law.
13. **Contracts: Intent.** Whether a contract is entire or several is a question of intentions apparent in the instrument.
14. **Statutes.** The meaning of a statute is a question of law.
15. **Judgments: Appeal and Error.** An appellate court decides a question of law independently of the conclusion reached by the trial court.
16. **Statutes.** Absent anything to the contrary, statutory language is to be given its plain and ordinary meaning.
17. **Antenuptial Agreements: Alimony.** Neb. Rev. Stat. § 42-1004(1)(d) (Reissue 2004) applies to both permanent and temporary spousal support.
18. **Statutes.** To the extent that there is conflict between two statutes on the same subject, the specific statute controls over the general statute.
19. **Supersedeas Bonds: Appeal and Error.** An appellate court will not modify a district court's order setting the amount of a supersedeas bond unless it finds the district court abused its discretion.
20. ____: ____. The exercise by the trial court of its discretion with respect to fixing the terms and conditions of a supersedeas bond will not be interfered with on appeal unless there has been a manifest abuse of discretion or injustice has resulted.
21. **Judgments: Records: Appeal and Error.** It is the appellant's duty to present and show by the record that the judgment is erroneous.
22. **Divorce: Attorney Fees: Appeal and Error.** In an action for dissolution of marriage, the award of attorney fees is discretionary with the trial court, is reviewed de novo on the record, and will be affirmed in the absence of an abuse of discretion.
23. **Child Custody: Appeal and Error.** In contested custody cases, where material issues of fact are in great dispute, the standard of review and the amount of deference granted to the trial judge, who heard and observed the witnesses testify, are often dispositive of whether the trial court's determination is affirmed or reversed on appeal.
24. **Divorce: Child Custody.** When custody of a minor child is an issue in a proceeding to dissolve the marriage of the child's parents, child custody is determined by parental fitness and the child's best interests.
25. **Child Custody.** When both parents are found to be fit, the inquiry for the court is the best interests of the child.

Appeal from the District Court for Douglas County: GARY B. RANDALL, Judge. Affirmed as modified.

Mark J. Milone, of Govier, Milone & Kinney, L.L.P., for appellant.

P. Shawn McCann, of Sodoro, Daly & Sodoro, P.C., for appellee.

SIEVERS, CARLSON, and CASSEL, Judges.

CASSEL, Judge.

INTRODUCTION

The marriage of Jeffrey L. Edwards and Dianna Y. Edwards was dissolved by a decree of the district court for Douglas County. Dianna appeals, and Jeffrey cross-appeals. On our de novo review, we conclude that the district court did not abuse its discretion in its determinations regarding the division of the marital estate, Jeffrey's motion for temporary relief, a supersedeas bond, attorney fees, and custody of the parties' minor children. We further conclude that a premarital agreement entered into by the parties prior to their marriage is valid and enforceable in its entirety. We affirm the district court's decree as modified.

BACKGROUND

Jeffrey and Dianna met in 1994. At the time of their meeting, Dianna was a registered nurse employed by the University of Nebraska Medical Center. In the summer of 1994, Dianna began working for Jeffrey while continuing her employment with the medical center. In 1995, she earned her bachelor of science degree in nursing.

When the parties met, Jeffrey was a physician and the sole shareholder and practitioner of a professional corporation he formed in 1993. He had additional business interests in a winery and in several assisted living facilities.

Approximately 3 months after they met, Dianna moved into Jeffrey's residence, a house that he purchased in 1990. Shortly thereafter, the parties began contemplating marriage. They married in June 1996.

According to Jeffrey, the parties started discussing a premarital agreement approximately 14 months prior to their wedding. They had continuing discussions on the matter until they executed an agreement on May 21, 1996. Jeffrey testified that both he and Dianna were represented by counsel while they negotiated the terms of the agreement. He testified that several drafts of the agreement were prepared before the parties agreed to the final terms. Jeffrey testified that requests by Dianna's attorney prompted the changes that were made to the original draft. Jeffrey's attorney, the author of the premarital agreement, corroborated Jeffrey's testimony and also testified that Dianna was not pressured into signing the agreement.

Dianna testified that she began preparing for the parties' wedding approximately 9 months before it took place. In preparation for the wedding, she reserved a church and decorations for the church, scheduled the reception, purchased her wedding gown, prepared and mailed wedding invitations, and hired someone to bake the wedding cake. Dianna testified that Jeffrey "brought up" the premarital agreement to her about 2 months prior to the wedding. By that time, she had completed all of the preparations mentioned above and had expended approximately $1,500 in anticipation of the wedding. After Jeffrey presented the first draft of the premarital agreement to her, Dianna hired an attorney and spent approximately 1 hour with her attorney discussing the terms of the agreement.

According to Dianna, on the day the parties executed the agreement, Jeffrey called her from work and instructed her to meet him at his attorney's office. Dianna then called her attorney, who informed her that he no longer wished to represent her. When Dianna arrived at the office of Jeffrey's attorney, she told Jeffrey and his attorney that she no longer had legal representation. According to Dianna, Jeffrey responded, "Well, you don't really need [an attorney]" and told her to sign the agreement. Jeffrey also informed her that his attorney was leaving town the following day and would not return until after the wedding. Dianna testified that she protested, but still signed the agreement. Jeffrey does not dispute that Dianna's counsel was not present when the parties signed the agreement.

Dianna testified that she was unaware of Jeffrey's income when she signed the agreement and that she felt "significant pressure" to sign the agreement. She also testified that she was taking antidepressant medication prescribed to her by Jeffrey when she signed the agreement. We will further discuss the circumstances surrounding the execution of the premarital agreement as necessary in the analysis section.

The premarital agreement provides that each party had been fully informed as to the other's assets and property. Indeed, exhibits listing the identity and approximate value of each party's assets are attached to the agreement. Jeffrey showed that at the time the agreement was executed, his total assets were valued at approximately $1,710,299.21. Dianna showed her total assets to be valued at $28,463. Jeffrey did not include his income in his declaration of assets.

The agreement states that in the event of divorce, "neither party shall be entitled to any of the separate property of the other, except as set forth in Paragraph 9 hereinafter." Paragraph 9 states that if the parties divorce, Dianna is entitled to the following property: a family car worth at least $15,000, furniture she brought into the marriage, all of her personal effects, and permanent alimony and a lump-sum payment based upon the duration of the marriage. In the event that children were born to the marriage or either party became disabled, subparagraph E of paragraph 9 contemplates temporary alimony or spousal support but limits it to a period of 6 months.

The parties' marriage produced two children: A.E., born in September 1999, and J.J.E., born in October 2001. On February 12, 2003, Jeffrey petitioned the district court for dissolution of the marriage. He sought custody of the children. Dianna filed a cross-petition seeking custody of the children, spousal support, and exclusive possession of the marital residence. On June 5, the district court issued a temporary order awarding Dianna custody of the children, child support, exclusive possession of the family residence, and alimony.

A 5-day trial commenced on November 22, 2004. A considerable amount of testimony was adduced during the trial. We have considered all of the testimony, but summarize only

that which is the most pertinent to the issues presented for our resolution.

Both parties testified and called witnesses to testify regarding their parenting abilities. Jeffrey, who was 47 years old at the time of trial, testified that the marriage to Dianna was his second. His first marriage produced two daughters—Me.E. and Ma.E.—and ended in divorce when those children were ages 4 and 3 respectively. Jeffrey was granted sole physical custody of Me.E. and Ma.E. and raised those two girls with the assistance of an in-house nanny. At the time of trial, Me.E. was 21 years old and Ma.E. was 20 years old.

Jeffrey testified that he was still employed by the professional corporation, but that he no longer worked nights or weekends as he had in the past. He testified that if he were awarded custody of A.E. and J.J.E., he intended to hire a nanny to care for them while he is at work.

Although Jeffrey testified at trial that Dianna is a good provider for A.E. and J.J.E., he also testified extensively about the deficiencies he perceived in Dianna's parenting. He testified that Dianna used inappropriate language in the presence of A.E. and J.J.E. He also testified that Dianna had verbally and physically abused A.E. and J.J.E. However, when pressed to explain the alleged physical abuse, he gave the following examples: First, he testified that Dianna allowed her pet dog to lick A.E.'s mouth and did nothing to discourage A.E. from this activity. Second, he testified that Dianna took the children to unnecessary chiropractic appointments. Third, he testified that when he arrived at the marital residence one day during the winter of 2003, he discovered the children alone in a vehicle in the garage. He opined that Dianna left them in the garage after a trip because they fell asleep in the vehicle. Jeffrey further testified that Dianna is an alcoholic. He testified that Dianna had used alcohol in the presence of the children and that on at least one occasion had the children with her while she drove under the influence of alcohol. Jeffrey also testified that Dianna had physically abused Me.E. and Ma.E. in the presence of A.E. and J.J.E.

Jeffrey expressed concern about the condition of the marital residence since his departure upon the parties' separation. Jeffrey testified that he returned to the residence after the

separation to inventory some personal items and observed a "foul aroma" that he believed came from animal waste. He testified that after the parties' separation, Dianna had acquired two dogs and two birds. These animals joined two dogs and three cats already living in the home. He testified that he also noticed stains from animal waste throughout the house.

Jeffrey testified that Dianna made decisions about A.E.'s education without consulting him. He explained that Dianna had removed A.E. from the kindergarten to which the parties had agreed to send her without consulting with Jeffrey and eventually enrolled A.E. in preschool. He also testified that Dianna often placed the children in daycare while they were in her custody even though she was not employed outside the home. He testified that during the marriage, Dianna was not at home with the children on a regular basis and frequently used daycare providers even when she was at home. Finally, Jeffrey testified that Dianna lacked financial stability.

Jeffrey called multiple witnesses to testify on his behalf. A longtime friend of Jeffrey's testified that he had observed both Jeffrey and Dianna with their children on many occasions. He testified that when he saw Dianna with the children, she seemed "very aloof, very unattentive to the children," and did not show a lot of affection toward them. He testified that on one occasion, he observed Dianna caring for A.E. while Dianna appeared to be intoxicated.

Ma.E., Jeffrey's daughter, testified that she lived with Jeffrey and Dianna until August 2002, at which time she moved out of the family residence to attend college. Ma.E. testified that she witnessed Dianna consume alcoholic beverages on an almost daily basis when she resided with Jeffrey and Dianna. She testified that she believed Dianna was intoxicated on one occasion when Dianna drove a vehicle in which Ma.E. and A.E. were passengers. She also testified that she believed that on New Year's Day 2003, Dianna drove while intoxicated with J.J.E. in the vehicle. Ma.E. also testified that Dianna hit her while Ma.E. held A.E. during a confrontation between the women. She also testified that she witnessed Dianna assault Me.E. on more than one occasion. She recalled that Dianna assaulted Me.E. and

attempted to run Jeffrey over with her car during a family trip in August 2001.

Ma.E. testified that Dianna often did not stay home to care for A.E. and J.J.E. Instead, the children were put in daycare while Dianna engaged in self-gratifying activities. Ma.E. testified that Dianna even hired daycare providers to watch A.E. and J.J.E. at the house while Dianna was present. On cross-examination, Ma.E. admitted that despite the weaknesses she perceived in Dianna's parenting, A.E. and J.J.E. were well socialized, healthy, and appropriately dressed and groomed.

Dianna testified in her own behalf. Dianna was 45 years old at the time of trial. She testified that at all relevant times, she had been the children's primary caregiver and had been primarily responsible for the children's hygiene, health, and day-to-day needs. She testified that she disciplines the children. She testified that she stopped working during the parties' marriage in order to care for the children on a full-time basis. She testified that she supervises the children at extracurricular activities. She also testified that she takes the children to church and teaches Sunday school.

Dianna admitted that some of the testimony given on Jeffrey's behalf was true. She admitted that she had made decisions regarding A.E.'s education without consulting Jeffrey. She explained that she removed A.E. from kindergarten because A.E. experienced separation anxiety, was young for her class, and was scoring below average. Dianna testified that A.E. performed very well in preschool. She also admitted that A.E. and J.J.E. are placed in daycare on a regular basis. She testified that she exercises while the children are in daycare, but testified that most of the time when they are placed in daycare, she cleans or attends meetings and hearings, presumably related to the divorce.

Dianna also admitted that she has many pets. However, she testified that she discourages A.E. from allowing the dogs to lick her and further testified that she regularly cleans the carpets and sheets in the house. Finally, Dianna admitted that she grabbed Me.E. by the neck during a family trip. She explained that she did not intend to hurt Me.E., but only wanted to get Me.E.'s attention.

Dianna denied much of the remaining testimony against her. She denied trying to run over Jeffrey with her car. She testified that much of Ma.E.'s testimony was untrue and opined that Ma.E. was motivated to testify against her by Ma.E.'s close relationship with Jeffrey. Dianna denied that she ever drove under the influence while the children were with her and denied ever being intoxicated while caring for the children. She testified that she has never left the children unsupervised.

Dianna's neighbor of 5 years testified that she regularly allows her daughter to spend time with A.E. under Dianna's care. She testified that she regularly sees Dianna with the children at church and that Dianna teaches Sunday school. She testified that Dianna keeps the parties' house "[p]retty tidy, probably better than mine, but it[']s fine, yeah." She testified that A.E. and J.J.E. interact well with others and are well-groomed children. She testified that she has never seen Dianna consume an alcoholic beverage and has never thought that Dianna had been drinking while caring for the neighbor's children. She further testified that she has never observed Dianna drive erratically.

Dianna's mother testified that although Dianna is not the "best housekeeper," Dianna keeps the parties' house clean. She testified that she has observed A.E. and J.J.E. in the presence of Dianna's animals and never worries about the children or about their interaction with the animals. She testified that Dianna is a good, nurturing parent and that the children are well disciplined.

Marlys Oestreich, Dianna's psychotherapist, testified that she counseled Dianna from July 2000 to December 2003 for symptoms of depression, anxiety, and alcohol abuse. Oestreich testified that Dianna took medication to treat depression. Oestreich testified that during one counseling session, Dianna disclosed that she had had an altercation with either Me.E. or Ma.E. and that she grabbed one of the girls by the neck. Oestreich testified that Dianna asked her for assistance on how to mend her relationship with Me.E. and Ma.E. after the altercation. Oestreich understood from later sessions that Dianna had made amends with them.

Oestreich testified that she does not see Dianna as an alcoholic. Oestreich testified that she observed Dianna interact with

A.E. and J.J.E., that Dianna was appropriate with the children, and that there was no indication that Dianna is an unfit parent; in fact, she opined that Dianna could be a successful parent. Oestreich further testified that after Dianna's final visit, Oestreich made notes indicating that Dianna was doing well, that her depression was under control, and that there were no alcohol concerns. She had also recorded that Dianna was active in life and was maintaining self-care activities.

On June 30, 2005, the court entered a decree dissolving the parties' marriage. The court found that both Jeffrey and Dianna are "fit and proper persons to be awarded the custody of the minor children," but that the best interests of the children would be served by awarding custody to Dianna subject to Jeffrey's reasonable rights of visitation. The court found the premarital agreement valid and enforced it in its entirety, with the exception of subparagraph E of paragraph 9—the provision limiting temporary spousal support. Pursuant to the terms of the premarital agreement, the court awarded Dianna alimony in the sum of $1,000 per month for a period of 15 months commencing May 1, as well as a lump-sum payment of $35,000. The court awarded Jeffrey the marital residence. The court found that a piano at issue was marital property and awarded each party one-half of the value of the piano. The court ordered Jeffrey to pay $12,500 of Dianna's attorney fees.

On July 8, 2005, Dianna filed a motion to alter or amend judgment, requesting the court to restore her maiden name. In a separate motion made on the same day, Dianna moved the court for a new trial. After a hearing, the court overruled Dianna's motion for new trial, but did not announce a decision on her motion to alter or amend.

On August 31, 2005, Dianna filed a notice of appeal. This court dismissed Dianna's appeal for lack of jurisdiction, finding it premature because the district court had not rendered a decision on her motion to alter or amend judgment. Upon remand, the district court entered an order overruling Dianna's motion to alter or amend judgment.

Dianna timely appeals. Jeffrey cross-appeals.

ASSIGNMENTS OF ERROR

Dianna assigns that the district court erred in (1) determining that most of the provisions of the premarital agreement are valid and enforceable, (2) applying the provisions of the premarital agreement and awarding Dianna alimony of $1,000 per month for 15 months in addition to a lump-sum payment of $35,000, (3) dividing the parties' financial accounts and business assets as provided in the premarital agreement, and (4) finding the piano to be marital property and awarding each party one-half of its value.

Jeffrey assigns on cross-appeal that the district court erred in (1) granting Dianna custody of the parties' children, (2) finding that the provision of the premarital agreement limiting temporary spousal support is unenforceable, (3) denying Jeffrey's motion for temporary relief in aid of appeal and not setting a proper supersedeas, and (4) awarding Dianna attorney fees.

STANDARD OF REVIEW

[1] Whether Dianna waived her right to appellate review is a question of law. See *Liming v. Liming*, 272 Neb. 534, 723 N.W.2d 89 (2006).

[2-4] An appellate court's review in an action for dissolution of marriage is de novo on the record to determine whether there has been an abuse of discretion by the trial judge. *Millatmal v. Millatmal*, 272 Neb. 452, 723 N.W.2d 79 (2006). This standard of review applies to the trial court's determinations regarding custody, child support, division of property, alimony, and attorney fees. *Id*. In a review de novo on the record, an appellate court reappraises the evidence as presented by the record and reaches its own independent conclusions with respect to the matters at issue. *Paulsen v. Paulsen*, 11 Neb. App. 362, 650 N.W.2d 497 (2002). A judicial abuse of discretion exists when the reasons or rulings of a trial judge are clearly untenable, unfairly depriving a litigant of a substantial right and denying just results in matters submitted for disposition. *Id.*

[5] When the evidence is in conflict, an appellate court considers, and may give weight to, the fact that the trial judge heard and observed the witnesses and accepted one version of

the facts rather than another. See *Druba v. Druba*, 238 Neb. 279, 470 N.W.2d 176 (1991).

ANALYSIS

Waiver of Appeal.

We first address Jeffrey's argument that Dianna waived her right to appeal by accepting alimony payments after entry of the decree. The record confirms that after entry of the decree, several alimony payments of $1,000 each were electronically transferred from Jeffrey to Dianna through the Nebraska Child Support Payment Center. The parties apparently had established an automatic payment system whereby funds to satisfy Jeffrey's temporary spousal support obligation were automatically transferred from Jeffrey to Dianna. Automatic payments continued after entry of the decree.

The record demonstrates that Dianna attempted to avoid acceptance of these payments. She moved for an order from the district court identifying a location where she could deposit the alimony payments that she had received after entry of the decree. Dianna specifically stated in the motion that she was seeking to avoid accepting the benefits of the decree. The court determined that it lacked jurisdiction to determine whether Dianna had accepted benefits of the decree, but nonetheless entered an order authorizing Dianna to deposit the disputed alimony payments into an interest-bearing account to be held by the clerk of the district court pending appeal. On February 9, 2006, Dianna provided notice that she tendered $10,000 to the clerk of the district court.

[6] As a general rule, a party who accepts the benefits of a decree waives the right to prosecute an appeal from it. See *Harte v. Castetter*, 38 Neb. 571, 57 N.W. 381 (1894). In *Larabee v. Larabee*, 128 Neb. 560, 259 N.W. 520 (1935), the Nebraska Supreme Court held that a litigant cannot voluntarily accept payment of that part of a judgment that is in his or her favor and thereafter prosecute an appeal from that part of the judgment against him or her.

[7] One notable exception to the acceptance of benefits rule was recognized by the Nebraska Supreme Court in *Kassebaum v. Kassebaum*, 178 Neb. 812, 135 N.W.2d 704 (1965). In

Liming v. Liming, 272 Neb. 534, 544-45, 723 N.W.2d 89, 97 (2006), the Nebraska Supreme Court further developed the exception, explaining:

> [A] spouse who accepts the benefits of a divorce judgment does not waive the right to appellate review under circumstances where the spouse's right to the benefits accepted is conceded by the other spouse, the spouse was entitled as a matter of right to the benefits accepted such that the outcome of the appeal could have no effect on the right to those benefits, or the benefits accepted are pursuant to a severable award which will not be subject to appellate review.

Dianna received $46,000 in temporary alimony paid in sums of $2,000 per month from June 2003 to April 2005. She was awarded $50,000 in permanent alimony under the decree. Jeffrey argues in his cross-appeal that the district court should have enforced the provision in the premarital agreement limiting temporary alimony to 6 months. It is therefore Jeffrey's contention that Dianna should have only received $12,000 in temporary alimony and $50,000 in permanent alimony. Dianna has thus far received $56,000 in temporary and permanent alimony. She received $10,000 of that amount after entry of the decree. Jeffrey does not contest that Dianna was entitled to at least this amount. His challenge is limited to how much alimony Dianna is entitled to in addition to that which she has already received. Jeffrey has essentially conceded that Dianna was entitled to the $10,000 that she received after entry of the decree. Therefore, this case falls within the exception set forth in *Liming v. Liming, supra*. Dianna did not waive her appellate rights, and this argument lacks merit.

Validity of Premarital Agreement.

[8,9] In 1983, the National Conference of Commissioners on Uniform State Laws approved and recommended for enactment in all states the Uniform Premarital Agreement Act (the Uniform Act). In 1994, the Nebraska Legislature adopted a version of the Uniform Act. See 1994 Neb. Laws, L.B. 202. Neb. Rev. Stat. §§ 42-1001 to 42-1011 (Reissue 2004) (the Nebraska Act) govern premarital agreements executed on or after July

16, 1994. The Nebraska Act authorizes parties contemplating marriage to contract with respect to matters, not in violation of public policy or in violation of statutes imposing criminal penalties, including the rights and obligations of each party in any property of the other, the disposition of property upon divorce, and the modification or elimination of spousal support. See § 42-1004(1). The enforceability of premarital agreements is governed by § 42-1006, which in relevant part provides:

> (1) A premarital agreement is not enforceable if the party against whom enforcement is sought proves that:
>
> (a) That party did not execute the agreement voluntarily; or
>
> (b) The agreement was unconscionable when it was executed and, before execution of the agreement, that party:
>
> (i) Was not provided a fair and reasonable disclosure of the property or financial obligations of the other party;
>
> (ii) Did not voluntarily and expressly waive, in writing, any right to disclosure of the property or financial obligations of the other party beyond the disclosure provided; and
>
> (iii) Did not have, or reasonably could not have had, an adequate knowledge of the property or financial obligations of the other party.

[10] The party opposing enforcement of a premarital agreement has the burden of proving that the agreement is not enforceable. See § 42-1006(1). See, also, *In re Estate of Peterson*, 221 Neb. 792, 381 N.W.2d 109 (1986).

Dianna contends that the factors set forth in § 42-1006(1) are present in this case and that therefore, the premarital agreement is unenforceable. We first consider whether Dianna executed the agreement voluntarily. Neither the Uniform Act nor the Nebraska Act defines "voluntarily," and the appellate courts of this state have not addressed the meaning of "voluntarily" in this context. We therefore turn to other sources for guidance.

[11] The term "voluntarily" is defined in Black's Law Dictionary 1605 (8th ed. 2004) as "[i]ntentionally; without coercion." Appellate courts in other jurisdictions have considered the meaning of "voluntarily" in the context of premarital agreements. Most notably, the California Supreme Court

engaged in an extensive discussion of the meaning of "voluntarily" as used in the Uniform Act in *In re Marriage of Bonds*, 24 Cal. 4th 1, 5 P.3d 815, 99 Cal. Rptr. 2d 252 (2000). After reviewing multiple sources, including the record of the proceedings of the National Conference of Commissioners on Uniform State Laws, the California Supreme Court determined that a number of factors are relevant to the issue of voluntariness. The California Supreme Court held that when considering the issue, courts should consider whether the evidence demonstrates coercion or lack of knowledge, and stated that in cases cited by the commissioners, courts have considered factors such as

> the coercion that may arise from the proximity of execution of the agreement to the wedding, or from surprise in the presentation of the agreement; the presence or absence of independent counsel or of an opportunity to consult independent counsel; inequality of bargaining power—in some cases indicated by the relative age and sophistication of the parties; whether there was full disclosure of assets; and the parties' understanding of the rights being waived under the agreement or at least their awareness of the intent of the agreement.

Id. at 18, 5 P.3d at 824-25, 99 Cal. Rptr. 2d at 262. The court also stated:

> [T]he party seeking to avoid a premarital agreement may prevail by establishing that the agreement was involuntary, and that evidence of lack of capacity, duress, fraud, and undue influence, as demonstrated by a number of factors uniquely probative of coercion in the premarital context, would be relevant in establishing the involuntariness of the agreement.

Id. at 19, 5 P.3d at 825-26, 99 Cal. Rptr. 2d at 263-64.

Courts in other jurisdictions have relied upon the California Supreme Court's interpretation of "voluntarily." See, e.g., *In re Marriage of Shirilla*, 319 Mont. 385, 89 P.3d 1 (2004); *Sheshunoff v. Sheshunoff*, 172 S.W.3d 686 (Tex. App. 2005). We likewise find its interpretation of "voluntarily" instructive and therefore consider the factors set forth above in our discussion.

Dianna argues that her lack of legal representation when she signed the premarital agreement supports a finding that she did

not voluntarily execute the agreement. Although the presence or absence of independent counsel is a factor set forth in *In re Marriage of Bonds, supra*, this factor is not determinative of whether a party has voluntarily entered into a premarital agreement. See *Matter of Estate of Lutz*, 563 N.W.2d 90 (N.D. 1997). The fact that Dianna was not represented by counsel when she signed the agreement gives only minimal support to Dianna's argument in light of the circumstances surrounding the execution of the agreement. We give this factor little weight because Dianna was represented by counsel while the terms of the agreement were negotiated and until immediately prior to the execution of the agreement. She met with counsel and had the opportunity to ask questions about the agreement. The original draft was altered at the request of Dianna's attorney. In addition, there were several weeks between the time Dianna found out that her attorney had withdrawn and the wedding. During this time, she could have sought additional legal advice.

Dianna also asserts that she was coerced into signing the agreement. She argues that if she had refused to sign the agreement, "she would have been left without a home and a relationship with Jeffrey's two young children for whom she then had been the caretaker for a period of over a year" and her "professional life also would have been destroyed." Brief for appellant at 13-14. She also asserts that she felt coerced because many preparations had been made for the wedding by the time Jeffrey asked her to sign the agreement and Jeffrey was treating her for depression when she signed the agreement.

While there was testimony that Jeffrey would not marry Dianna unless she signed the agreement, there is no evidence to support Dianna's contention that if she did not sign the agreement, Jeffrey would terminate her employment and make her leave his home. With regard to her depression, Dianna gave no reason why she could not get her medication from another physician and did not adduce any evidence that this factor influenced her decision to sign the agreement. Finally, because there were several weeks between the execution of the agreement and the parties' wedding, we do not believe that the proximity of these two events placed undue duress or coercion on Dianna.

Finally, Dianna cites to Jeffrey's superior business knowledge. At the relevant times, Jeffrey was a physician employed by, and the sole shareholder of, a professional corporation providing medical services. When the parties executed the agreement, Jeffrey also owned shares in several other businesses, including assisted living facilities and a winery. He also served as a medical advisor for three clinics. Shortly before the parties signed the agreement, Jeffrey had assets valued at over $1.7 million.

Dianna's assets and business experience were considerably less. She disclosed assets valued at approximately $28,000 before she signed the premarital agreement. In 1996, she made approximately $50,000. She was not a business owner and was employed by Jeffrey. While these factors lead us to conclude that Dianna's business experience was less than Jeffrey's, they do not persuade us that Dianna lacked the knowledge necessary to make a voluntary decision regarding the agreement. Dianna was an educated individual who was assisted by an attorney in the negotiation process. The record reveals that the parties' marriage was Dianna's second. Her first marriage ended in divorce. She therefore had some experience with the process of divorce and the possibility of an award of spousal support upon a divorce. Further, the terms and conditions of the premarital agreement were set forth in a straightforward and clear manner. The agreement states that Dianna fully understood the agreement and its covenants prior to signing the agreement. The agreement also states, "The parties hereto acknowledge that they execute this Agreement as their free and voluntary act and that they are not under any constraint or not executing same based upon any coercion or undue influence."

[12] In addition to Dianna's specific assertions, we have also considered whether any of the other factors set forth in *In re Marriage of Bonds*, 24 Cal. 4th 1, 5 P.3d 815, 99 Cal. Rptr. 2d 252 (2000), require a finding that Dianna's entry into the agreement was involuntary. We conclude that they do not. We therefore proceed to Dianna's argument that the agreement was unconscionable when it was executed. The issue of unconscionability of a premarital agreement is a question of law. See

§ 42-1006(3). Dianna's sole support for this argument is that because the district court determined that subparagraph E of paragraph 9 was unconscionable, "it stands to reason the entire document is therefore unconscionable." Brief for appellant at 20. We discuss the trial court's holding regarding subparagraph E of paragraph 9 later in our analysis.

[13] Dianna's argument is illogical and unsupported by law. The provisions of § 42-1006 do not in any way suggest that if any part of a premarital agreement is unconscionable, the entire agreement is unenforceable. Case law has made it clear that contract provisions may be severable. See, e.g., *Gaspar v. Flott*, 209 Neb. 260, 307 N.W.2d 500 (1981). Whether a contract is entire or several is a question of intentions apparent in the instrument. *Id.*

The parties made their intentions clear. A provision in the agreement specifically states, "The covenants and agreements contained in this Agreement . . . are intended to be separate and divisible." It further states that if any of the agreement's provisions are found in violation of law, such provisions "shall be . . . of no effect to the extent of such declaration of invalidity, and this provision shall be deemed separable from the other provisions of this Agreement, which other provisions shall continue in full force and effect." The provision deemed unconscionable by the district court was severable from the other provisions of the agreement; Dianna's argument is without merit regardless of our decision regarding subparagraph E of paragraph 9.

Because we conclude that the agreement was not unconscionable when it was executed, it is unnecessary for us to discuss whether Dianna was provided fair and reasonable disclosure of Jeffrey's assets, as this factor alone is not sufficient to make the agreement unenforceable. See § 42-1006(1)(b). It is also unnecessary, in light of our conclusions in this section, for us to discuss Dianna's second and third assignments of error. See *Kelly v. Kelly*, 246 Neb. 55, 516 N.W.2d 612 (1994) (appellate court is not obligated to engage in analysis which is not needed to adjudicate case and controversy before it). We therefore turn to Dianna's final assignment of error.

Piano as Marital Property.

The district court found the piano at issue to be marital property and awarded each party one-half of the piano's $20,000 value. Dianna contends that the piano was her separate property and that she should have been awarded its entire value. Her argument relies upon a provision in the parties' premarital agreement that states that there is a presumption that all property acquired by either spouse subsequently to the marriage is nonmarital. We also notice a provision in the agreement reserving the parties' right to own property jointly.

Jeffrey and Dianna gave conflicting testimony as to which party financed the piano. Each testified that he or she alone paid for the piano. Upon our de novo review, we give weight to the district court's finding that the piano was marital property. Implicit in this finding is that neither party individually purchased the piano, but that they purchased the piano together. This finding is supported by the evidence. Dianna's argument lacks merit. We now direct our attention to Jeffrey's assigned errors.

Limitation of Temporary Support.

The district court determined that the premarital agreement is valid and enforceable, with the exception of subparagraph E of paragraph 9, which subparagraph provides:

> In the event that [Jeffrey] and [Dianna] have a child or children from said marriage . . . the custodial parent . . . shall be entitled to such amounts of temporary alimony or spousal support as is [sic] awarded by a Court having jurisdiction over the parties for a period not exceeding six (6) months. After said six (6) month period, the above [sliding-scale alimony award] is the maximum that said [Dianna] shall receive.

(Emphasis omitted.) The district court found that subparagraph E of paragraph 9 "violates the intent and purpose of statutory provisions regarding an award of temporary support in a dissolution matter." The court further found that enforcement of this provision would be inequitable and unconscionable.

Pursuant to the premarital agreement, the district court awarded Dianna $50,000 in permanent alimony. Jeffrey was ordered to

pay Dianna $1,000 per month for 15 months commencing May 1, 2005, and a lump sum of $35,000. These payments were in addition to the $46,000 of temporary alimony Dianna had already received in monthly installments of $2,000 from June 2003 to April 2005.

Jeffrey contends that subparagraph E of paragraph 9 should have been enforced in full and that therefore, Dianna should have only received temporary alimony for 6 months—from June to November 2003—at $2,000 per month, for a total of $12,000. Thereafter, his obligation should have been $1,000 per month for 15 months—from December 2003 to February 2005—in addition to the lump-sum payment of $35,000. According to Jeffrey, the total awarded Dianna for both temporary and permanent alimony should have been $62,000 instead of $96,000.

The resolution of this assignment turns upon the interplay between § 42-1004(1) and Neb. Rev. Stat. § 42-357 (Reissue 2004). Section 42-1004(1), in relevant part, states: "Parties to a premarital agreement may contract with respect to: . . . (d) The modification or elimination of spousal support . . . and (h) Any other matter, including their personal rights and obligations, not in violation of public policy or a statute imposing a criminal penalty." Section 42-357, in relevant part, states: "The court may order either party to pay . . . a sum of money for the temporary support and maintenance of the other party and minor children if any are affected by the action and to enable such party to prosecute or defend the action."

[14-16] The meaning of a statute is a question of law. *In re Estate of Nemetz*, 273 Neb. 918, 735 N.W.2d 363 (2007). An appellate court decides a question of law independently of the conclusion reached by the trial court. *Malena v. Marriott International*, 264 Neb. 759, 651 N.W.2d 850 (2002). Absent anything to the contrary, statutory language is to be given its plain and ordinary meaning. *Geddes v. York County*, 273 Neb. 271, 729 N.W.2d 661 (2007).

[17] Section 42-1004(1)(d) grants parties the right to contract with respect to the modification or elimination of spousal support. Section 42-1004(1)(d) does not limit its reach to only permanent spousal support. If it was the intent of the Legislature

to allow parties to eliminate only permanent spousal support, it could have easily included a modifier in the statute. Because the Legislature did not do this, we recognize that § 42-1004(1)(d) applies to both permanent and temporary spousal support. See *Pepitone v. Winn*, 272 Neb. 443, 449, 722 N.W.2d 710, 714 (2006) ("[t]hat which is implied in a statute is as much a part of it as that which is expressed").

We agree with Jeffrey that the district court erred in holding that subparagraph E of paragraph 9 violates the intent and purpose of statutory provisions regarding an award of temporary support in a dissolution matter. We find no conflict between the two relevant statutory provisions. While § 42-357 allows the court to enter an order for temporary support of a spouse and § 42-1004(1)(d) allows the parties to contractually eliminate spousal support, § 42-357 also empowers the district court to require a party to pay sums of money to enable the other party to prosecute or defend against the action. The Nebraska Act does not allow parties to contract away the court's authority to require such payments. Thus, despite the existence of a premarital agreement limiting the amount or duration of temporary spousal support, a trial court retains the ability to order payment of moneys necessary to enable the party to maintain or defend against the action. The district court made no finding that temporary payments beyond those specified in the premarital agreement were necessary to allow Dianna to defend against the action.

[18] Even if we assume that such a conflict existed, the rule giving preference to a specific statute over a general statute resolves the conflict. To the extent that there is conflict between two statutes on the same subject, the specific statute controls over the general statute. *Soto v. State*, 269 Neb. 337, 693 N.W.2d 491 (2005). The Nebraska Act specifically permits parties to a premarital agreement to contract for "modification or elimination of spousal support." § 42-1004(1)(d). Regarding the issue we confront, § 42-1004(1)(d) is the more specific statute. We hold that subparagraph E of paragraph 9 is valid under § 42-1004(1)(d). We therefore modify the district court's decree on this issue.

Supersedeas Bond and Temporary Relief in Aid of Appeal Process.

After Dianna filed her second notice of appeal, both parties moved the district court for an order providing temporary relief pending appeal and an order setting supersedeas. Both parties requested possession of the marital residence pending appeal.

The court held a hearing on the motions. During the hearing, the court granted Dianna continued possession of the marital residence pending appeal. In support of its decision, the court stated, "We've got an appeal and a cross appeal. Custody is one of the issues. I'm not going to uproot the kids and I'm not going to move anybody out until the Court of Appeals makes a decision on what they're [sic] going to do." The court set supersedeas at $5,000 and stated, "[Dianna] does need to pay the expenses and that includes the homeowner's insurance on the property." According to Jeffrey's brief, the court entered a written order memorializing its oral pronouncements, but we do not have that order in our record.

First, Jeffrey assigns that the district court erred in not granting him possession of the marital residence pending appeal. Under Neb. Rev. Stat. § 42-351(2) (Reissue 2004), the district court had jurisdiction while this appeal was pending to "provide for such orders . . . shown to be necessary to allow the use of property . . . or other appropriate orders in aid of the appeal process." The reasons provided by the district court for allowing Dianna to maintain possession of the residence convince us that the court did not abuse its discretion.

Jeffrey also argues that because the supersedeas bond does not contain the conditions that Dianna pay all rents or damages to the residence that may accrue during the pendency of the appeal and that she will not commit or suffer to be committed any waste upon the residence, the district court erred in not setting a proper supersedeas bond in compliance with Neb. Rev. Stat. § 25-1916(3) (Cum. Supp. 2006). He further argues that the supersedeas does not reflect 50 percent of Dianna's net worth when considering the amount of money and property awarded to her under the decree.

[19,20] The appellate court will not modify the district court's order setting the amount of a supersedeas bond unless it

finds the district court abused its discretion. *World Radio Lab. v. Coopers & Lybrand*, 2 Neb. App. 747, 514 N.W.2d 351 (1994). The exercise by the trial court of its discretion with respect to fixing the terms and conditions of a supersedeas bond will not be interfered with on appeal unless there has been a manifest abuse of discretion or injustice has resulted. *Id.*

Section 25-1916(3) states that

> [w]hen the judgment, decree, or order directs the sale or delivery of possession of real estate, the bond . . . shall be in such sum, not exceeding the lesser of fifty percent of the appellant's net worth or fifty million dollars . . . conditioned that the appellant or appellants will prosecute such appeal without delay, will not during the pendency of such appeal commit or suffer to be committed any waste upon such real estate, and will pay all costs and all rents or damages to such real estate which may accrue during the pendency of such appeal and until the appellee is legally restored thereto.

Jeffrey's argument that the bond should be set aside because it does not reflect 50 percent of Dianna's net worth lacks merit. Contrary to Jeffrey's assertion, § 25-1916(3) does not provide that 50 percent of the appellant's net worth is a minimum amount for a supersedeas bond; this amount is the maximum amount at which bond may be set.

[21] We move to Jeffrey's argument regarding the conditions placed on the bond. The district court orally pronounced the bond and its conditions. Apparently, the court later entered a written order. It is not uncommon for a court to orally announce its decision in general terms and later formalize the decision in a written order and include all statutorily required conditions. The court's written order is not in our record. We are unable to ascertain whether the conditions required by § 25-1916(3) were included in the written order. It is the appellant's duty to present and show by the record that the judgment is erroneous. *Buker v. Buker*, 205 Neb. 571, 288 N.W.2d 732 (1980). As to this matter, Jeffrey did not do so. We therefore cannot conclude that the district court abused its discretion. This assignment has no merit.

Attorney Fees.

[22] Jeffrey assigns that the district court erred in awarding Dianna $12,500 in attorney fees. In an action for dissolution of marriage, the award of attorney fees is discretionary with the trial court, is reviewed de novo on the record, and will be affirmed in the absence of an abuse of discretion. *Gress v. Gress*, 271 Neb. 122, 710 N.W.2d 318 (2006). Upon our de novo review of the record, we find no abuse of discretion in the district court's award of attorney fees.

Custody.

The district court held that both Dianna and Jeffrey are fit and proper persons to be awarded custody of the parties' children, but that "the best interests of the . . . children would be served by awarding [Dianna] custody," subject to Jeffrey's reasonable rights of visitation. Jeffrey assigns error to this determination.

[23] In contested custody cases, where material issues of fact are in great dispute, the standard of review and the amount of deference granted to the trial judge, who heard and observed the witnesses testify, are often dispositive of whether the trial court's determination is affirmed or reversed on appeal. *Marcovitz v. Rogers*, 267 Neb. 456, 675 N.W.2d 132 (2004). Our review of the district court's custody determination is de novo on the record to determine whether the court abused its discretion, and we give weight to the trial court's determination of evidence in conflict. See, *Gress v. Gress, supra*; *Smith-Helstrom v. Yonker*, 249 Neb. 449, 544 N.W.2d 93 (1996).

[24,25] When custody of a minor child is an issue in a proceeding to dissolve the marriage of the child's parents, child custody is determined by parental fitness and the child's best interests. *Gress v. Gress, supra*. When both parents are found to be fit, the inquiry for the court is the best interests of the child. See *id*. In the instant case, Jeffrey does not challenge the district court's determination that Dianna is a fit parent; Jeffrey argues only that it is in the children's best interests to be placed in his custody.

In determining the best interests of the child, Neb. Rev. Stat. § 42-364(2) (Reissue 2004) provides that such consideration shall include, but not be limited to the following:

(a) The relationship of the minor child to each parent prior to the commencement of the action or any subsequent hearing;

(b) The desires and wishes of the minor child if of an age of comprehension regardless of chronological age, when such desires and wishes are based on sound reasoning;

(c) The general health, welfare, and social behavior of the minor child; and

(d) Credible evidence of abuse inflicted on any family or household member.

In addition, courts may consider factors such as general considerations of moral fitness of the child's parents, including the parents' sexual conduct; respective environments offered by each parent; the emotional relationship between child and parents; the age, sex, and health of the child and parents; the effect on the child as the result of continuing or disrupting an existing relationship; the attitude and stability of each parent's character; and parental capacity to provide physical care and satisfy the educational needs of the child. See *Davidson v. Davidson*, 254 Neb. 357, 576 N.W.2d 779 (1998).

In *Davidson v. Davidson*, the district court dissolved the parties' marriage and awarded the father custody of the parties' five children. The mother appealed. On petition for further review, the Nebraska Supreme Court found that both the father and the mother were far from ideal parents. The court stated that while the mother had provided adequate care for the children, she had oftentimes used poor judgment and had placed her own immediate gratification before the children's needs. She had not spent a lot of time with the children since the birth of the parties' fifth child. Regarding the father, the court stated that while there was substantial testimony that the father was a fit parent and attentive to the children's needs, there was testimony that he used poor judgment and had used inappropriate disciplinary measures in the past. In addition, the father had a history of abuse and drug use. He had been arrested for child abuse for leaving the children unattended in a car, and there was testimony that he abused the mother.

In its analysis, the court stated that it was not unconcerned about evidence calling into question the father's parental skills

and capacity or about the allegations regarding spousal abuse. Nonetheless, the court found:

> [T]here is substantial evidence that the father is a fit parent and attentive to the children's needs. Moreover, there was evidence that the father would provide a more stable home environment for the children's educational and emotional needs. It is this type of case, where neither parent can be described as unfit in a legal sense but neither can be described as an ideal parent, that we give particular weight to the fact that the trial court saw and heard the witnesses in making necessary findings as to the best interests and welfare of the children.

Id. at 369, 576 N.W.2d at 786. The court concluded that the trial court did not abuse its discretion in granting custody of the children to the father.

The instant case is similar to *Davidson v. Davidson, supra*, in that much of the testimony is conflicting and the parenting skills of the custodial parent, Dianna, have been called into question.

At trial, Jeffrey presented Dianna in a negative light. Some of the most disturbing testimony regarding Dianna's parental skills was that she had driven while intoxicated with the children in the vehicle and that she had been intoxicated while caring for the children. Dianna disputed this testimony. We infer from its decision that the district court accepted Dianna's testimony and give weight to the district court's decision to accept Dianna's testimony.

We also recognize that the district court's decision implicitly favors Dianna's testimony over that of Ma.E. regarding the other matter that is particularly disturbing—Ma.E.'s claim that Dianna had abused her and Me.E. while in the presence of A.E. and J.J.E. While this testimony raises concern, that concern is mitigated by other circumstances. First, there is no doubt that Dianna's relationship with Me.E. and Ma.E., her stepdaughters, was strained, at best, during most of the parties' marriage. While there were at least two instances of physical contact between Dianna and her stepdaughters, the behavior did not frequently occur. Second, Dianna sought assistance from her therapist in order to improve her relationship with her

stepdaughters. Finally, and most importantly, there was no evidence that these events in any way harmed A.E. or J.J.E. There was no evidence of any effect, harmful or otherwise, that such events had on the children. Me.E. and Ma.E. no longer live with Dianna, and therefore, we can presume that there will be no further incidents between Dianna and her stepdaughters in the presence of A.E. and J.J.E.

There is evidence that Dianna is a fit parent. Oestreich testified that Dianna is appropriate with the children and opined that Dianna could be a successful parent. While Jeffrey has worked long hours and has often been away on trips, Dianna has served as the children's primary caregiver. The children have done well under Dianna's care. There is evidence that the children are well-behaved, socialized, and well-groomed children.

After considering all of the evidence, we conclude that this is a case in which we should give particular weight to the fact that the district court saw and heard the witnesses in making findings as to the best interests and welfare of the children. See *Davidson v. Davidson*, 254 Neb. 357, 576 N.W.2d 779 (1998). We conclude that the district court did not abuse its discretion in awarding custody of the minor children to Dianna.

CONCLUSION

We conclude that the district court correctly found that the majority of the premarital agreement is valid and enforceable, but erred in finding that the provision limiting temporary support is unenforceable. We also conclude that the district court did not abuse its discretion in dividing the marital estate, denying Jeffrey's motion for temporary relief, setting the supersedeas bond, awarding Dianna attorney fees, and granting Dianna custody of the parties' minor children. We affirm the district court's decree as modified.

AFFIRMED AS MODIFIED.

STATE OF NEBRASKA, APPELLEE, V.
CLINTON M. MLYNARIK, APPELLANT.
743 N.W.2d 778

Filed January 15, 2008. No. A-07-449.

1. **Probation and Parole: Appeal and Error.** The standard used to review the terms of probation is whether the trial court abused its discretion.
2. **Sentences: Appeal and Error.** An abuse of discretion in imposing a sentence occurs when a sentencing court's reasons or rulings are clearly untenable and unfairly deprive the litigant of a substantial right.
3. **Appeal and Error.** Plain error may be found on appeal when an error unasserted or uncomplained of at trial, but plainly evident from the record, prejudicially affects a litigant's substantial right and, if uncorrected, would result in damage to the integrity, reputation, and fairness of the judicial process.

Appeal from the District Court for Sarpy County: DAVID K. ARTERBURN, Judge. Affirmed as modified.

Phillip G. Wright, of Wright & Associates, for appellant.

Jon Bruning, Attorney General, and James D. Smith for appellee.

SIEVERS, CARLSON, and CASSEL, Judges.

CARLSON, Judge.

INTRODUCTION

Clinton M. Mlynarik, the defendant, pled guilty in a plea agreement to the charge of attempted possession of a controlled substance, methamphetamine, a Class I misdemeanor. The district court sentenced the defendant to 3 years of intensive supervision probation with multiple probation conditions. The defendant appeals, claiming that some of the conditions of the probation are an abuse of discretion.

FACTUAL BACKGROUND

The factual background of this case was provided in the defendant's plea. In summary, the defendant admitted to the use of methamphetamine and, upon a consent search, certain paraphernalia needed for making methamphetamine was found. The defendant was originally charged with the felony charge of possession of a controlled substance, namely

methamphetamine, which charge was reduced to the plea charge of attempted possession.

After a presentence investigation, the defendant was sentenced to 3 years of intensive supervision probation.

ASSIGNMENT OF ERROR

The defendant assigns a single error as follows: "The District Court erred in and abused its discretion in sentencing the Defendant-Appellant under the terms and conditions of an Order of Probation entered March 30, 2007."

STANDARD OF REVIEW

[1] The standard used to review the terms of probation is whether the trial court abused its discretion. See *State v. Wood*, 245 Neb. 63, 511 N.W.2d 90 (1994).

[2] An abuse of discretion in imposing a sentence occurs when a sentencing court's reasons or rulings are clearly untenable and unfairly deprive the litigant of a substantial right. *State v. Iromuanya*, 272 Neb. 178, 719 N.W.2d 263 (2006).

ANALYSIS

The defendant claims three difficulties with the district court's probation sentence. In sum, they were that certain conditions of the probation were unrelated to the drug charge, that some went beyond the "usual terms of probation," and finally, that the sentencing court improperly delegated powers to the probation officer.

After a review of the record and, specifically, the probation order in toto, we find no abuse of discretion. It should be noted that the judge at sentencing stated that the defendant had "a criminal history going back to 1983" and "substance — alcohol and drug-related offenses that go back to 1986." These conclusions were totally supported in the record and by the defendant's record. The defendant's relevant criminal history, in brief, shows three driving under the influence convictions, three controlled substance convictions, and additional alcohol and drug-related offenses which were dismissed in other plea agreements. In regard to its probation sentence, the judge noted, "It's a probation that's designed to help you kick the habit that you've got and get you on the path towards sobriety and a more productive

life and hopefully on a path that won't bring you back before me or any other judge again."

At sentencing, the following colloquy occurred: "THE COURT: So are you willing to do these things? THE DEFENDANT: Yeah. THE COURT: You think you can do these things? THE DEFENDANT: Sure. Yeah, I can do it. It's a long time. Yeah, I can do it."

The defendant admits that his sentence was within the "statutory guidelines." We find no abuse of discretion on this record.

The appellee notes the potential of plain error in that the district court sentenced the defendant to a term of 3 years' probation for a "second offense misdemeanor." The applicable statute uses the language of a "second offense misdemeanor" but apparently does not define the term. Neb. Rev. Stat. § 29-2263(1) (Cum. Supp. 2006) states in part, "When a court has sentenced an offender to probation, the court shall specify the term of probation which *shall be not more than five years upon conviction of a felony or second offense misdemeanor and two years upon conviction of a first offense misdemeanor.*" (Emphasis supplied.) The amended information in this case did *not* allege a second offense misdemeanor.

This question of whether a person who has committed a number of misdemeanors falls into the category of a "second offense misdemeanor" under the above statute appears to be a one of first impression. It is true that the term "second offense" in Nebraska law generally denotes a specific chargeable offense, e.g., Neb. Rev. Stat. § 60-6,197.03 (Supp. 2007) (driving under the influence, second offense); Neb. Rev. Stat. § 60-4,108 (Reissue 2004) (driving under suspension, second offense); Neb. Rev. Stat. § 28-106 (Cum. Supp. 2006); *State v. Ladehoff*, 229 Neb. 111, 425 N.W.2d 352 (1988) (probation term of 2 years is maximum unless offense is felony or second offense misdemeanor).

[3] Based on the fact that the charge does not specify "second offense," we find that the district court's sentence was plain error. Plain error may be found on appeal when an error unasserted or uncomplained of at trial, but plainly evident from the record, prejudicially affects a litigant's substantial right and, if uncorrected, would result in damage to the integrity, reputation,

and fairness of the judicial process. *State v. Barfield*, 272 Neb. 502, 723 N.W.2d 303 (2006), *disapproved on other grounds, State v. McCulloch*, 274 Neb. 636, 742 N.W.2d 727 (2007). Finding plain error, we modify the defendant's sentence of probation from 3 years to 2 years.

CONCLUSION

Based on the foregoing, we affirm the district court's judgment as modified.

AFFIRMED AS MODIFIED.

KRISTI A. SHAFER, APPELLEE, V.
LAYNE D. SHAFER, APPELLANT.
743 N.W.2d 781

Filed January 22, 2008. No. A-06-362.

SUPPLEMENTAL OPINION

Appeal from the District Court for Dawson County: JAMES E. DOYLE IV, Judge. Supplemental opinion: Former opinion modified. Motion for rehearing overruled.

Brian J. Davis and Claude E. Berreckman, Jr., of Berreckman & Berreckman, P.C., for appellant.

Kent A. Schroeder, of Ross, Schroeder & George, L.L.C., for appellee.

IRWIN, SIEVERS, and CASSEL, Judges.

PER CURIAM.

This matter is before the court on the motion for rehearing of Layne D. Shafer regarding our opinion reported in *Shafer v. Shafer, ante* p. 170, 741 N.W.2d 173 (2007). We overrule the motion, but modify the opinion as follows:

In that portion of the opinion designated the "Analysis," the last paragraph of the section addressing the treatment of the cattle, *id.* at 178-79, 741 N.W.2d at 179, is withdrawn, and the following paragraph is substituted in its place:

> The change in the property division attributable to this modification is as follows: The trial court found that the total net marital estate was $446,462, which when reduced by $59,600 becomes $386,862. Thus, half of the net marital estate is $193,431. The trial court awarded Kristi $197,725 as her "net marital estate award" and an equalizing payment of $25,506. We eliminate the equalizing payment, leaving Kristi with a total of $197,725—approximately 51 percent of the net marital estate. In all other respects, we affirm the trial court's property division.

The remainder of the opinion shall remain unmodified.

FORMER OPINION MODIFIED.
MOTION FOR REHEARING OVERRULED.

MARY ELIZABETH WAGNER, APPELLEE, V.
JAMES BRIAN WAGNER, APPELLANT.
743 N.W.2d 782

Filed January 22, 2008. No. A-06-427.

1. **Jurisdiction: Appeal and Error.** Before reaching the legal issues presented for review, it is the duty of an appellate court to determine whether it has jurisdiction over the matter before it.
2. **Judgments: Final Orders: Time: Notice: Appeal and Error.** Proceedings to obtain a reversal, vacation, or modification of judgments and decrees rendered or final orders made by the district court shall be by filing within 30 days after the entry of such judgment, decree, or final order, a notice of intention to prosecute such appeal.
3. **Judgments: Words and Phrases.** A judgment is the final determination of the rights of the parties in an action.
4. **Judgments: Records: Words and Phrases.** Rendition of a judgment is the act of the court, or a judge thereof, in making and signing a written notation of the relief granted or denied in an action.
5. **Judgments: Records: Time: Appeal and Error.** The entry of a judgment, decree, or final order occurs when the clerk of the court places the file stamp and date upon the judgment, decree, or final order. For purposes of determining the time for appeal, the date stamped on the judgment, decree, or final order shall be the date of entry.

Appeal from the District Court for Hall County: JAMES LIVINGSTON, Judge. Appeal dismissed.

Riko E. Bishop, of Perry, Guthery, Haase & Gessford, P.C., L.L.O., for appellant.

Kevin A. Brostrom and Stacie A. Goding, of Lauritsen, Brownell, Brostrom, Stehlik, Myers & Daugherty, P.C., L.L.O., for appellee.

IRWIN, SIEVERS, and MOORE, Judges.

IRWIN, Judge.

I. INTRODUCTION

James Brian Wagner appeals a decree entered by the district court for Hall County dissolving his marriage to Mary Elizabeth Wagner. On appeal, James challenges various aspects of the court's property distribution, the court's alimony award, and the court's award of attorney fees to Mary. We conclude that a typewritten letter from the court to the parties which resolved all of the issues presented in the case and was filed with the court's clerk constituted the final, appealable order, and thus James' appeal from the subsequently filed "Decree of Dissolution" was not timely. We dismiss the appeal.

II. BACKGROUND

On January 2, 2004, Mary filed a petition seeking dissolution of the parties' marriage. A trial was conducted on August 22 and December 7, 2005.

On January 11, 2006, the district court filed with the clerk of the court a copy of a letter dated January 10 and sent to counsel for both parties. In that letter, the court indicated that "[b]y this letter I am rendering decision on the trial of this matter." The court directed Mary's counsel to "draft the Decree incorporating the findings and orders [in the letter] and submit it to [James' counsel] for his approval as to form and then to the Court." In the letter, the court resolved all issues, did not reserve judgment on anything, and did not direct the parties to advise the court of any issues not resolved or file any further requests for relief.

On February 7, 2006, the court filed a "Decree of Dissolution" which included all of the findings made in the court's January 11 letter to counsel. On February 17, James filed a motion seeking a new trial or an alteration or amendment to the judgment.

On March 14, the court filed a journal entry overruling the motion. James filed his notice of appeal on April 12.

III. ASSIGNMENTS OF ERROR

James has assigned four errors on appeal. Because of our conclusion that the appeal was not timely filed, we need not more specifically discuss James' assignments of error.

IV. ANALYSIS

Our review of the record in this case revealed that the district court filed a typewritten, signed letter to the parties in which the court resolved the issues presented. The subsequently filed "Decree of Dissolution" did not alter the findings of the court from those set forth in the letter. Pursuant to established precedent, we conclude that James failed to timely file his appeal.

[1-5] Before reaching the legal issues presented for review, it is the duty of an appellate court to determine whether it has jurisdiction over the matter before it. *City of Ashland v. Ashland Salvage*, 271 Neb. 362, 711 N.W.2d 861 (2006); *Hosack v. Hosack*, 267 Neb. 934, 678 N.W.2d 746 (2004); *Peterson v. Peterson*, 14 Neb. App. 778, 714 N.W.2d 793 (2006). Neb. Rev. Stat. § 25-1912(1) (Cum. Supp. 2006) provides that "proceedings to obtain a reversal, vacation, or modification of judgments and decrees rendered or final orders made by the district court . . . shall be by filing . . . within thirty days after the entry of such judgment, decree, or final order, a notice of intention to prosecute such appeal." Neb. Rev. Stat. § 25-1301 (Cum. Supp. 2006) provides in pertinent part:

> (1) A judgment is the final determination of the rights of the parties in an action.
>
> (2) Rendition of a judgment is the act of the court, or a judge thereof, in making and signing a written notation of the relief granted or denied in an action.
>
> (3) The entry of a judgment, decree, or final order occurs when the clerk of the court places the file stamp and date upon the judgment, decree, or final order. For purposes of determining the time for appeal, the date stamped on the judgment, decree, or final order shall be the date of entry.

1. Development of Law

The jurisdictional issue in the present case arises because the record includes two signed and file-stamped documents which contain the district court's findings and resolution on the issues presented at trial. In prior cases, the appellate courts of this state have established that in such a situation, if the first document is a final determination of the parties' rights and does not leave matters unresolved, it can be considered a final, appealable order for purposes of establishing the appropriate deadline for filing a notice of appeal. See, *City of Ashland v. Ashland Salvage, supra*; *Hosack v. Hosack, supra*; *Peterson v. Peterson, supra*.

(a) *Hosack v. Hosack*

In *Hosack v. Hosack, supra*, Judy Louise Hosack filed a petition seeking dissolution of her marriage to Max Galen Hosack. On October 15, 2002, the district court filed a journal entry resolving a number of the issues presented in the dissolution proceeding. The journal entry also specifically indicated that counsel was to advise the court, by written motion, if the court had failed to rule on any material issue and that if no motion was filed within 10 days, all matters not specifically ruled upon were deemed denied. The journal entry directed Judy's counsel to prepare the decree and present it to Max's counsel for review. A decree was signed by the district court on November 14 and filed by the clerk of the district court.

On December 4, 2002, Max filed a notice of appeal to this court. This court dismissed the appeal, ruling that the October 15 journal entry was a proper entry of judgment and that Max's notice of appeal was not timely. Max then sought and was granted further review by the Nebraska Supreme Court.

On further review, the Supreme Court held that the October 15, 2002, journal entry was not a proper entry of judgment. The court held that the journal entry "left certain matters unresolved" and noted that the journal entry "directed [counsel] to advise the district court by written motion if the court had failed to rule on any material issue presented." *Hosack v. Hosack*, 267 Neb. 934, 939, 678 N.W.2d 746, 752 (2004).

The Supreme Court also specifically disapproved of the practice of a trial court's filing a journal entry describing an order to be entered at a subsequent date. The court recognized that "'the confusion presented . . . can be avoided if trial courts will, as they should, limit themselves to entering but one final determination of the rights of the parties in a case.'" *Id.* at 940, 678 N.W.2d at 752, quoting *Federal Land Bank v. McElhose*, 222 Neb. 448, 384 N.W.2d 295 (1986). The court directed trial courts to "notify the parties of [the] findings and intentions as to the matter before the court by an appropriate method of communication without filing a journal entry" and noted that "[t]he trial court may thereby direct the prevailing party to prepare an order subject to approval as to form by the opposing party." 267 Neb. at 940, 678 N.W.2d at 752-53. The court specifically directed that "[o]nly the signed final order should be filed with the clerk of the court." *Id.* at 940, 678 N.W.2d at 753.

(b) *City of Ashland v. Ashland Salvage*

In *City of Ashland v. Ashland Salvage*, 271 Neb. 362, 711 N.W.2d 861 (2006), Ashland Salvage, Inc., and Arlo Remmen (collectively Ashland Salvage) filed suit against the City of Ashland to challenge a special assessment imposed by the city for cleanup costs associated with the removal of materials Ashland Salvage had been storing on portions of public rights-of-way. The city filed a declaratory judgment action, and prior to trial, the district court consolidated the two actions.

On November 22, 2004, following a trial, the district court ruled in favor of the city on the declaratory judgment claim in a file-stamped journal entry. The journal entry also directed counsel for the city to prepare an injunction. On November 30, Ashland Salvage filed a notice of appeal from the November 22 journal entry. On December 6, the court filed an order of permanent injunction.

The Nebraska Supreme Court held that the November 22, 2004, journal entry was a final, appealable order and that Ashland Salvage's appeal from it, rather than the later December 6 order, was timely. The court held that the journal entry resolved all issues raised in the declaratory judgment action and disposed of the whole merits of the case, notwithstanding

that it directed counsel for the city to prepare another order. The court held that the journal entry satisfied the requirements of § 25-1301 to constitute a judgment from which an appeal could be taken. In contrast to the journal entry in *Hosack v. Hosack, supra*, that left certain matters unresolved, the November 22 file-stamped journal entry disposed of all claims.

The Supreme Court also once again took the opportunity to disapprove of the practice of a trial court's filing of a journal entry describing an order to be entered on a subsequent date. The court again gave direction to the trial courts of the proper procedure and again indicated that "'[o]nly the signed [judgment, decree, or] final order should be filed with the clerk of the court.'" 271 Neb. at 368, 711 N.W.2d at 868, quoting *Hosack v. Hosack, supra*.

(c) *Peterson v. Peterson*

In *Peterson v. Peterson*, 14 Neb. App. 778, 714 N.W.2d 793 (2006), Mary J. Peterson filed a petition seeking dissolution of her marriage to Paul R. Peterson. On May 3, 2004, a document titled "'Opinion and Findings'" was file stamped and filed by the clerk of the district court. *Id.* at 779, 714 N.W.2d at 795. The May 3 document was also signed by the trial judge, and it set forth the court's resolution of the issues presented. The document did not include any language suggesting that either party could file any motion to advise the court of material issues left unresolved. The document did include a provision stating that Mary's counsel was "'to prepare a Decree in conformance with the Court's findings and submit the same to opposing Counsel for approval, then to the Court for signature.'" *Id.* at 781, 714 N.W.2d at 796. On May 4, the court entered an order nunc pro tunc in which the court revised the May 3 document with respect to two provisions.

On May 28, 2004, a "'Decree of Dissolution of Marriage'" was filed. *Id.* This document was also signed by the trial judge and file stamped, and it set forth essentially the same findings set forth in the previous two documents. On June 4, Mary filed a motion for new trial, which motion was denied on July 8. On August 3, Mary filed a notice of appeal, and Paul subsequently filed a cross-appeal.

This court reviewed the Nebraska Supreme Court's holdings in *City of Ashland v. Ashland Salvage*, 271 Neb. 362, 711 N.W.2d 861 (2006), and *Hosack v. Hosack*, 267 Neb. 934, 678 N.W.2d 746 (2004), to determine whether the May 3 and 4, 2004, documents should be considered a final, appealable order. We held that the May 3 and 4 documents set forth the district court's determination of the issues presented for resolution and left no matters unresolved. We held that, pursuant to *City of Ashland v. Ashland Salvage, supra*, the language directing one party's counsel to prepare another document did not contradict the May 3 and 4 documents' function as a final determination of the rights of the parties. Finally, we held that the May 28 decree did not alter the determination of the issues as set out in the May 3 and 4 documents. We concluded that Mary's notice of appeal was clearly filed out of time. We also held that Mary's motion for new trial was not timely filed with respect to the May 3 and 4 final order. On July 19, 2006, the Supreme Court overruled a petition for further review in *Peterson*.

In the course of this court's discussion in *Peterson*, we noted that the Nebraska Supreme Court has specifically disapproved of the practice of a trial court's filing a journal entry describing an order to be filed at a subsequent date. We quoted the Supreme Court's directions to trial courts from *City of Ashland v. Ashland Salvage, supra*, and *Hosack v. Hosack, supra*, as set forth above.

2. Application and Resolution

The present case is, for all practical purposes, nearly identical to *City of Ashland v. Ashland Salvage, supra*, and *Peterson v. Peterson, supra*. In this case, the district court filed a written, signed document which set forth the court's determination of all issues presented for resolution. In that document, the court specifically indicated that it was "rendering decision on the trial of this matter." In this case, that document was a letter to counsel for both parties, while in *City of Ashland*, that document was a signed journal entry and in *Peterson*, that document was in the form of an "Opinion and Findings"; but in each case, the court filed a written, signed document determining all issues presented. In each case, that written, signed document directed

counsel for one of the parties to prepare another document and present it to opposing counsel for approval as to form, but as the Nebraska Supreme Court directed in *City of Ashland*, that direction does not deprive the document of its function as a final, appealable order.

The letter to counsel in this case satisfied the requirements of § 25-1301(2) to constitute a rendition of judgment, because it was a written, signed notation of the relief granted or denied. The letter to counsel further satisfied the requirements of § 25-1301(3) to constitute the entry of a judgment, because the clerk placed the file stamp and date upon the letter.

Although the Nebraska Supreme Court has specifically cautioned in both *City of Ashland v. Ashland Salvage, supra*, and *Hosack v. Hosack, supra*, that *only* the final order should be filed by the trial court, the district court in the present case filed both the letter to counsel and the subsequently drafted decree of dissolution. As a result, the January 11, 2006, letter to counsel constituted a final, appealable order. James' notice of appeal was not filed until April 12, and was clearly filed out of time. Additionally, as in *Peterson v. Peterson*, 14 Neb. App. 778, 714 N.W.2d 793 (2006), the motion for new trial did not serve to toll the time for filing an appeal, because it was not filed within 10 days of the final, appealable order.

V. CONCLUSION

Having found that James' appeal was filed outside the 30-day time limit for filing an appeal, we are without jurisdiction to hear the appeal. The appeal is dismissed for lack of jurisdiction.

APPEAL DISMISSED.

JOHN WOODEN AND CONNIE WOODEN, HUSBAND AND WIFE, APPELLANTS, V. COUNTY OF DOUGLAS, A POLITICAL SUBDIVISION OF THE STATE OF NEBRASKA, APPELLEE.

744 N.W.2d 262

Filed January 22, 2008. No. A-06-1163.

1. **Judgments: Jurisdiction: Appeal and Error.** When a jurisdictional question does not involve a factual dispute, determination of the issue is a matter of law, which requires an appellate court to reach a conclusion independent from that of the trial court.
2. **Jurisdiction: Appeal and Error.** When a lower court lacks the authority to exercise its subject matter jurisdiction to adjudicate the merits of a claim, issue, or question, an appellate court also lacks the power to determine the merits of the claim, issue, or question presented to the lower court.
3. **Eminent Domain: Appeal and Error.** The manner of perfecting an appeal to the district court from an award by appraisers in a condemnation proceeding is fixed by Neb. Rev. Stat. § 76-715.01 (Reissue 2003).
4. **Eminent Domain: Notice: Affidavits: Time: Appeal and Error.** According to Neb. Rev. Stat. § 76-715.01 (Reissue 2003), proof of service of the notice of appeal shall be made by an affidavit of the appellant filed with the court within 5 days after the filing of the notice of appeal, stating that such notice of appeal was duly mailed or that after diligent search the addresses of such persons or their attorneys of record are unknown.
5. **Eminent Domain: Notice: Affidavits: Appeal and Error.** Pursuant to Neb. Rev. Stat. § 76-715.01 (Reissue 2003), timely filing of the affidavit of mailing notice is required.
6. **Eminent Domain: Jurisdiction: Appeal and Error.** The right to appeal is statutory, and the requirements of Neb. Rev. Stat. § 76-715.01 (Reissue 2003) are mandatory and must be complied with before the appellate court acquires jurisdiction of the subject matter of the action.
7. **Jurisdiction: Appeal and Error.** It is fundamental that an appellate court cannot pass on the merits of a case falling within its appellate jurisdiction unless its jurisdiction is invoked in the manner prescribed by statute.

Appeal from the District Court for Douglas County: JOHN D. HARTIGAN, JR., Judge. Affirmed.

William E. Pfeiffer, of Raynor, Rensch & Pfeiffer, for appellants.

Donald W. Kleine, Douglas County Attorney, and Bernard J. Monbouquette for appellee.

IRWIN, SIEVERS, and MOORE, Judges.

SIEVERS, Judge.

John Wooden and Connie Wooden appeal from the decision of the district court for Douglas County dismissing their appeal of condemnation proceedings commenced by the County of Douglas (County) for lack of subject matter jurisdiction. We affirm. Pursuant to our authority under Neb. Ct. R. of Prac. 11B(1) (rev. 2006), we have ordered this case submitted for decision without oral argument.

FACTUAL AND PROCEDURAL BACKGROUND

The factual background is unnecessary to the disposition of this case. Therefore, we limit our discussion to the procedural aspects of this case. The report and award of the appraisers was filed with the county court for Douglas County on August 17, 2005. On September 9, the Woodens filed with the county court their notice of intent to appeal the report and award of the appraisers to the district court. The Woodens filed their "Affidavit of Mailing of Notice" with the district court for Douglas County on September 21.

On July 20, 2006, the County filed a motion to dismiss the Woodens' "'pending legal action,'" alleging in part that the district court lacked subject matter jurisdiction. In an order filed September 19, the district court found that it did in fact lack personal and/or subject matter jurisdiction, and granted the County's motion to dismiss. The Woodens now appeal from the district court's order.

ASSIGNMENT OF ERROR

The Woodens allege, restated, that the district court erred in granting the County's motion to dismiss the Woodens' condemnation appeal to the district court.

STANDARD OF REVIEW

[1,2] When a jurisdictional question does not involve a factual dispute, determination of the issue is a matter of law, which requires an appellate court to reach a conclusion independent from that of the trial court. *White v. White*, 271 Neb. 43, 709 N.W.2d 325 (2006). When a lower court lacks the authority to exercise its subject matter jurisdiction to adjudicate the merits of a claim, issue, or question, an appellate court also lacks the

power to determine the merits of the claim, issue, or question presented to the lower court. *Roubal v. State*, 14 Neb. App. 554, 710 N.W.2d 359 (2006).

ANALYSIS

[3,4] The manner of perfecting an appeal to the district court from an award by appraisers in a condemnation proceeding is fixed by Neb. Rev. Stat. § 76-715.01 (Reissue 2003). *Radil v. State*, 182 Neb. 291, 154 N.W.2d 466 (1967). Section 76-715.01 provides:

> The party appealing from the award for assessment of damages by the appraisers in any eminent domain action shall, within thirty days of the filing of the award, file a notice of appeal with the court, specifying the parties taking the appeal and the award thereof appealed from, and shall serve a copy of the same upon all parties bound by the award or upon their attorneys of record. Service may be made by mail, and proof of such service shall be made by an affidavit of the appellant filed with the court within five days after the filing of the notice stating that such notice of appeal was duly mailed or that after diligent search the addresses of such persons or their attorneys of record are unknown.

The report and award of the appraisers was filed on August 17, 2005. The Woodens filed their notice of intent to appeal the report and award of the appraisers on September 9. Thus, the Woodens did file their notice of intent to appeal within 30 days of the filing of the award by the appraisers. However, the Woodens did not file their affidavit of mailing notice until September 21—12 days after the filing of the notice of appeal. Thus, the Woodens did not file their affidavit within 5 days after the filing of the notice of appeal as required by § 76-715.01.

[5-7] While compliance with the requirement of timely filing the affidavit of mailing notice pursuant to § 76-715.01 has not been the subject of prior appellate litigation in Nebraska, we find that such timely compliance is required. "The right to appeal is statutory and the requirements of the statute are mandatory and must be complied with before the appellate court acquires jurisdiction of the subject matter of the action." *Radil v. State*,

182 Neb. at 293, 154 N.W.2d at 468. And, "[i]t is fundamental that an appellate court cannot pass on the merits of a case falling within its appellate jurisdiction unless its jurisdiction is invoked in the manner prescribed by statute." *Id*.

CONCLUSION

Because the Woodens failed to comply with the 5-day requirement of § 76-715.01 for timely filing the affidavit of mailing notice, neither the district court nor this court has subject matter jurisdiction over the action. The order of the district court dismissing the Woodens' appeal of the condemnation proceedings commenced by the County is hereby affirmed.

We do not address the Woodens' additional assignments and arguments, because they are not necessary to our analysis. See *Jackson v. Brotherhood's Relief & Comp. Fund*, 273 Neb. 1013, 734 N.W.2d 739 (2007) (appellate court is not obligated to engage in analysis which is not needed to adjudicate case and controversy before it).

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V.
CHRISTOPHER PETERSEN, APPELLANT.
744 N.W.2d 266

Filed January 22, 2008. No. A-07-179.

1. **Convictions: Evidence: Appeal and Error.** Regardless of whether the evidence is direct, circumstantial, or a combination thereof, and regardless of whether the issue is labeled as a failure to direct a verdict, insufficiency of the evidence, or failure to prove a prima facie case, the standard is the same: In reviewing a criminal conviction, an appellate court does not resolve conflicts in the evidence, pass on the credibility of witnesses, or reweigh the evidence. Such matters are for the finder of fact, and a conviction will be affirmed, in the absence of prejudicial error, if the evidence, viewed and construed most favorably to the State, is sufficient to support the conviction.
2. ____: ____: ____. When reviewing a criminal conviction for sufficiency of the evidence to sustain the conviction, the relevant question for an appellate court is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.
3. **Statutes.** The meaning of a statute is a question of law.

4. **Judgments: Appeal and Error.** When reviewing questions of law, an appellate court has an obligation to resolve the questions independently of the conclusion reached by the trial court.
5. **Sentences: Appeal and Error.** A sentence imposed within statutory limits will not be disturbed on appeal absent an abuse of discretion by the trial court.
6. **Sentences.** An abuse of discretion occurs when a sentencing court's reasons or rulings are clearly untenable and unfairly deprive the litigant of a substantial right and a just result.
7. ____. In considering a sentence to be imposed, the sentencing court is not limited in its discretion to any mathematically applied set of factors.
8. ____. The appropriateness of a sentence is necessarily a subjective judgment and includes the sentencing judge's observation of the defendant's demeanor and attitude and all the facts and circumstances surrounding the defendant's life.

Appeal from the District Court for Sarpy County: DAVID K. ARTERBURN, Judge. Affirmed.

Thomas P. Strigenz, Sarpy County Public Defender, and Regan Fahey Muhs, Senior Certified Law Student, for appellant.

Jon Bruning, Attorney General, and Kimberly A. Klein for appellee.

INBODY, Chief Judge, and CARLSON and CASSEL, Judges.

CARLSON, Judge.

INTRODUCTION

After a bench trial in the district court for Sarpy County, Christopher Petersen was convicted of enticement of a child for sexual purposes through the use of a computer, in violation of Neb. Rev. Stat. § 28-320.02 (Cum. Supp. 2004). On appeal, Petersen asserts that venue is improper, that there is insufficient evidence to convict him of violating § 28-320.02, that his motion to continue sentencing should have been granted, and that his sentence is excessive. Based on the reasons that follow, we affirm.

FACTUAL BACKGROUND

On April 6, 2006, Brad Wood, a police officer with the La Vista Police Department went "undercover" as a 13-year-old girl named "Missy" in an Internet chat room under the "screen name" of "lilmissygurl2003." During the time Wood was in the chat room, he and the computer he was using were located at the

police station in La Vista. While Wood was in the chat room, he received a private message from "ursweetdreamnomaha," later identified as Petersen, who was 20 years old at the time. The private message could not be seen by others in the chat room. A conversation then ensued between the two in this private message location. A complete printed copy of the dialog between Missy and Petersen was entered into evidence at trial.

At the beginning of the conversation, Missy told Petersen that she was a 13-year-old female. Petersen next asked Missy if she had a picture of herself that she could send, and when she did not, Petersen asked her to describe what she looked like. Petersen then asked Missy if she would want to "hangout." He first suggested going to a park or watching a movie and then further stated, "I love to cuddle but [I do not know] if [you] would want to." He also told Missy that she could try "weed" if she wanted to, if they met. Petersen next asked Missy what she looks for in guys and whether she likes to date older guys. Petersen then changed the conversation into one of a more sexually explicit nature. Petersen asked Missy if she was a virgin and if she liked being a virgin or if she wanted "to do more." He also asked, "[W]hat have [you] done with a guy?" During the conversation, Missy told Petersen that she may be able to meet him after lunch and Petersen asked her if she wanted to "have [him] for dessert." He followed that question with the statement, "[W]ell maybe we can start with cuddling and see how it goes from there." Petersen also told Missy that she should wear a skirt when they meet because "it might cum in handy" and would be "less trouble than jeans."

Petersen also asked Missy about the tightness of her vaginal area, specifically asking her to see how many fingers she could insert into her vagina. Petersen also told Missy that he was "really hard" and asked her if he should "jack off" or wait for her. Petersen next asked Missy, "do [you] suck" and whether she would "swallow."

At the end of the Internet conversation, Petersen and Missy arranged to meet at the clubhouse of Missy's apartment complex, located in Sarpy County, immediately following their conversation. When the conversation ended, Wood proceeded to the apartment clubhouse where Missy and Petersen agreed

to meet. Shortly after Wood arrived, Petersen also arrived in his car. Wood made contact with Petersen and identified himself as a police officer, at which time Petersen told Wood that Missy told him she was 17 years old. Petersen was placed under arrest. Wood conducted a search of Petersen's vehicle and found an empty box of condoms and a pair of handcuffs.

After Petersen's arrest, Wood interviewed Petersen at the police department. Petersen told Wood that he was the person using the screen name "ursweetdreamnomaha," that he believed Missy was 13 years old, and that he had been using his laptop computer at his residence for the Internet chat with Missy. Petersen told Wood that his only intent was to "hang out" with Missy.

Wood subsequently conducted a search of Petersen's residence and located and seized the laptop computer that Petersen said had been used for the conversation with Missy. Wood testified that a search of Petersen's computer revealed an archived copy of the dialog between Petersen and Missy.

Petersen testified that he likes to go to chat rooms to meet people to "hang out" with. Petersen testified that at the beginning of his conversation with Missy, she told him that she was 13 years old. He testified that they started talking about "basic stuff" which then led into sexual comments. He testified that he asked Missy the questions that were of a sexual nature out of curiosity or because they were conversation starters. Petersen admitted that he was masturbating during part of the online chat. Petersen testified that his only intention when meeting Missy was to "hang out" with her. Petersen further testified that it was not his intent to have sex with Missy when he met her, but he thought that they would maybe "cuddle." Petersen admitted that based on the conversation that occurred between him and Missy, it appeared that his intention was to have sex with Missy, but he stated that was not his intent.

PROCEDURAL BACKGROUND

On May 24, 2006, an information was filed in the district court for Sarpy County charging Petersen with enticement of a child for sexual purposes through the use of a computer. Petersen pled not guilty, and a bench trial was held on November 1.

Petersen made a motion to dismiss at the close of the State's evidence and at the end of all the evidence, which the trial court overruled. Following trial, the trial court found Petersen guilty. The trial court set sentencing for February 2, 2007, and ordered that a presentence investigation report (PSI) be completed. On January 31, 2007, Petersen filed a motion to continue sentencing and request for a new PSI, alleging that the current PSI contained erroneous and prejudicial information. The court overruled the motion to continue. The trial court sentenced Petersen to a term of 3 to 5 years' imprisonment. Petersen filed a motion for new trial, which was overruled. Petersen appeals his conviction and sentence.

ASSIGNMENTS OF ERROR

Petersen assigns that the trial court erred in (1) finding that Sarpy County was a proper venue for the case; (2) allowing Wood to testify as to the definition of a computer; (3) finding that the State proved that Petersen used a computer in violation of § 28-320.02, as defined in Neb. Rev. Stat. § 28-1343 (Reissue 1995); (4) denying his motion to dismiss; (5) denying his motion for new trial; (6) denying his motion to continue sentencing and request for a new PSI; and (7) imposing an excessive sentence.

STANDARD OF REVIEW

[1] Regardless of whether the evidence is direct, circumstantial, or a combination thereof, and regardless of whether the issue is labeled as a failure to direct a verdict, insufficiency of the evidence, or failure to prove a prima facie case, the standard is the same: In reviewing a criminal conviction, an appellate court does not resolve conflicts in the evidence, pass on the credibility of witnesses, or reweigh the evidence. Such matters are for the finder of fact, and a conviction will be affirmed, in the absence of prejudicial error, if the evidence, viewed and construed most favorably to the State, is sufficient to support the conviction. *State v. Kuehn*, 273 Neb. 219, 728 N.W.2d 589 (2007); *State v. Johnson*, 261 Neb. 1001, 627 N.W.2d 753 (2001).

[2] When reviewing a criminal conviction for sufficiency of the evidence to sustain the conviction, the relevant question for

an appellate court is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *State v. Aldaco*, 271 Neb. 160, 710 N.W.2d 101 (2006); *State v. Atchison*, 15 Neb. App. 422, 730 N.W.2d 115 (2007).

[3,4] The meaning of a statute is a question of law. *State v. Vasquez*, 271 Neb. 906, 716 N.W.2d 443 (2006); *Lamar Co. v. Omaha Zoning Bd. of Appeals*, 271 Neb. 473, 713 N.W.2d 406 (2006). When reviewing questions of law, an appellate court has an obligation to resolve the questions independently of the conclusion reached by the trial court. *Id.*

ANALYSIS

Venue.

Petersen first argues that Sarpy County was not a proper venue for the charge against him. He contends that because the use of a computer is required to violate § 28-320.02, the location of his computer when the crime was committed is paramount in determining proper venue. Thus, he argues that because the computer he used to commit the crime was located in Douglas County, Sarpy County is an improper venue and Douglas County is the only proper venue to try the case against him. We conclude that under Neb. Rev. Stat. § 29-1301.01 (Reissue 1995), venue in Sarpy County is proper. Section 29-1301.01 states:

> If any person shall commit an offense against the person of another, such accused person may be tried in the county in which the offense is committed, or in any county . . . in which an act is done by the accused in instigating, procuring, promoting, or aiding in the commission of the offense . . . .

The offense of child enticement involves the soliciting, coaxing, enticing, or luring of a child or a police officer believed by a defendant to be a child. Thus, the crime requires that there be a recipient of a defendant's actions in order for soliciting, coaxing, enticing, or luring to occur. In the instant case, the police officer being solicited, the recipient of Petersen's actions, was located in Sarpy County and was receiving and responding to

Petersen's messages from a computer located in Sarpy County. Therefore, the place where the soliciting, coaxing, enticing, or luring occurred was in Sarpy County. Further, the meeting which was arranged between Petersen and Missy took place in Sarpy County. Thus, we conclude that Sarpy County is a county "in which an act is done by the accused in instigating, procuring, promoting, or aiding in the commission of the offense." Accordingly, Sarpy County is a proper venue in which to hold Petersen's trial for the offense of child enticement by computer.

Sufficiency of Evidence.

Petersen's next two assignments of error are related and basically allege that there is insufficient evidence to support a conviction of child enticement by computer. Specifically, Petersen argues that Wood does not have sufficient expertise, nor was sufficient foundation laid, to permit Wood to testify that Petersen used a computer as defined by § 28-1343. Petersen further argues that even if Wood's testimony is admissible, it is still insufficient to prove that Petersen used a computer in violation of § 28-320.02, as defined in § 28-1343.

Section 28-320.02 states in part as follows:

> (1) No person shall knowingly solicit, coax, entice, or lure (a) a child sixteen years of age or younger or (b) a peace officer who is believed by such person to be a child sixteen years of age or younger, by means of a computer as that term is defined in section 28-1343, to engage in an act which would be in violation of section 28-319 or 28-320.01 or subsection (1) or (2) of section 28-320.

"Computer" is defined in § 28-1343(2) as

> a high-speed data processing device or system which performs logical, arithmetic, data storage and retrieval, communication, memory, or control functions by the manipulation of signals, including, but not limited to, electronic or magnetic impulses, and shall include any input, output, data storage, processing, or communication facilities directly related to or operating in conjunction with any such device or system.

Wood testified that he has had several training classes involving "computer forensics, conducting forensic examinations of computers, the different parts that make up a computer" and training on the basic principles of data recovery and data created by a computer. He further testified that he has had prior experience with laptop computers like the one recovered from Petersen's residence and that Petersen's computer is capable of data storage and retrieval. Wood also testified that Petersen told him that he was using his laptop computer to conduct the Internet chat. We conclude that allowing Wood's testimony regarding Petersen's computer was not an abuse of discretion and that there was sufficient evidence to establish that Petersen used a computer as defined in § 28-1343. Petersen's first two assignments of error are without merit.

We further conclude that the evidence demonstrates that Petersen believed he was talking with a 13-year-old girl and "solicited, coaxed, enticed, or lured" her by means of a computer to meet him with the intent of engaging in an act which would be in violation of § 28-319 or § 28-320.01. Thus, when viewing the evidence in a light most favorable to the State, the evidence is sufficient to support a conviction for child enticement by computer.

Motion to Dismiss and Motion for New Trial.

Petersen also assigns that the trial court erred in failing to grant his motion to dismiss made at the end of the State's case and at the close of all the evidence and erred in failing to grant his motion for new trial. Both of these assignments of error are based on the same arguments made by Petersen that we have addressed above, i.e., improper venue and lack of sufficient evidence in regard to Petersen's use of a computer. Accordingly, we need not address these two assignments of error further as they are without merit for the same reasons previously set forth in this opinion.

Motion to Continue Sentencing and Request for New PSI.

Petersen next assigns that the trial court erred in failing to sustain his motion to continue sentencing and request for a new PSI. Petersen contends that his motion to continue

sentencing should have been granted to allow for a new PSI to be completed because the PSI presented to the court contained "numerous erroneous, prejudicial errors that resulted in biased recommendations by the Probation Officer to the Court." Brief for appellant at 22. Specifically, Petersen complains that the probation officer who prepared the PSI was under the mistaken impression Petersen had lied to her about being enrolled at the University of Nebraska at Omaha (UNO) and that such mistake tainted the entire PSI and resulted in the probation officer's recommending a harsher sentence than she would have without the mistaken belief.

The PSI presented to the court shows two places where the probation officer incorrectly asserted that Petersen was not in school, as he had told her. However, the PSI also contains a notice from the probation officer to the district court indicating that the UNO registrar's office erred in the information it sent to the probation officer and that Petersen was in fact enrolled at UNO and was registered for 12 credit hours at the time. Therefore, the correction by the probation officer erases any "taint" the error may have lent to the PSI, because the trial court was informed that Petersen was enrolled at UNO just as he had told the probation officer. In addition, at the sentencing hearing, the trial court stated that Petersen's school status had been clarified, that his attendance at school worked in his favor, and "[a]s far as the recommendations being based on [the probation officer's] opinion or misunderstanding, however we want to characterize it, that will be disregarded by the Court as it relates to the issue that's raised in the motion [to continue sentencing] as far as whether any misrepresentations were made." Petersen does not argue or mention any other "erroneous, prejudicial errors" in the PSI. Therefore, we conclude that the trial court did not err in overruling Petersen's motion to continue sentencing and request for a new PSI.

Excessive Sentence.

[5-8] Finally, Petersen assigns as error that the sentence imposed by the district court was excessive. A sentence imposed within statutory limits will not be disturbed on appeal absent an abuse of discretion by the trial court. *State v. Losinger*,

268 Neb. 660, 686 N.W.2d 582 (2004); *State v. Atchison*, 15 Neb. App. 422, 730 N.W.2d 115 (2007). An abuse of discretion occurs when a sentencing court's reasons or rulings are clearly untenable and unfairly deprive the litigant of a substantial right and a just result. *Id.* In considering a sentence to be imposed, the sentencing court is not limited in its discretion to any mathematically applied set of factors. *State v. Griffin*, 270 Neb. 578, 705 N.W.2d 51 (2005); *State v. Atchison, supra*. The appropriateness of a sentence is necessarily a subjective judgment and includes the sentencing judge's observation of the defendant's demeanor and attitude and all the facts and circumstances surrounding the defendant's life. *Id.*

Here, the trial court sentenced Petersen to incarceration of 3 to 5 years. A violation of § 28-320.02 is a Class IIIA felony, punishable by up to 5 years' imprisonment, a $10,000 fine, or both. See Neb. Rev. Stat. § 28-105 (Cum. Supp. 2006). Petersen's sentence is within the statutory limits. Further, the record contains no indication that the trial court abused its discretion. We conclude that Petersen's sentence is not excessive.

CONCLUSION

We conclude that Sarpy County was a proper venue in which to conduct Petersen's trial, that there is sufficient evidence to convict Petersen of enticement of a child for sexual purposes through the use of a computer, that his motion to continue sentencing and request for a new PSI was properly overruled, and that his sentence is not excessive. Accordingly, Petersen's conviction and sentence are affirmed.

AFFIRMED.

MARK A. STOETZEL, APPELLEE, V. BEVERLY NETH, DIRECTOR, DEPARTMENT OF MOTOR VEHICLES OF THE STATE OF NEBRASKA, APPELLANT.

744 N.W.2d 465

Filed January 29, 2008. No. A-06-678.

1. **Administrative Law: Drunk Driving: Licenses and Permits: Revocation: Blood, Breath, and Urine Tests.** Neb. Rev. Stat. § 60-498.01(5)(a) (Reissue

2004) requires that a sworn report include the date the officer received the blood test results.

2. **Administrative Law: Drunk Driving: Licenses and Permits: Revocation: Jurisdiction.** The test to determine whether an omission on a sworn report is a jurisdictional defect rather than a technical one should be whether, notwithstanding the omission, the sworn report conveys the information required by the applicable statute.
3. **Administrative Law: Drunk Driving: Licenses and Permits: Revocation: Words and Phrases.** A sworn report in an administrative license revocation proceeding is, by definition, an affidavit.
4. **Affidavits: Words and Phrases.** An affidavit is a written or printed declaration or statement of facts, made voluntarily, and confirmed by the oath or affirmation of the party making it, taken before a person having authority to administer such oath or affirmation.
5. **Affidavits: Proof.** An affidavit must bear on its face, by the certificate of the officer before whom it is taken, evidence that it was duly sworn to by the party making the same.
6. **Public Officers and Employees: Records.** Neb. Rev. Stat. § 64-107 (Reissue 2003) mandates that a properly notarized document contain both the notary's signature and seal.
7. **Administrative Law: Drunk Driving: Licenses and Permits: Revocation: Time: Jurisdiction.** The 10-day time period for submitting a sworn report under Neb. Rev. Stat. § 60-498.01(5)(a) (Reissue 2004) is mandatory, and if the sworn report is submitted after the 10-day period, the Department of Motor Vehicles lacks jurisdiction to revoke a person's driver's license.

Appeal from the District Court for Buffalo County: JOHN P. ICENOGLE, Judge. Affirmed.

Jon Bruning, Attorney General, Laura L. Neesen, and Kevin J. Edwards for appellant.

Greg C. Harris for appellee.

IRWIN, SIEVERS, and MOORE, Judges.

IRWIN, Judge.

I. INTRODUCTION

The director of the Nebraska Department of Motor Vehicles (the Department) appeals the judgment of the district court which reversed an order of the Department revoking Mark A. Stoetzel's driver's license. After our review of the record, we find that a properly completed sworn report was not timely received by the Department and that, as a result, the Department did not have jurisdiction to revoke Stoetzel's driver's license. We affirm the decision of the district court.

II. BACKGROUND

We limit our recitation of facts to those relevant to the narrow issue presented. On February 18, 2006, an officer with the Buffalo County sheriff's office arrested Stoetzel for driving under the influence of alcohol. Upon Stoetzel's arrest, Sgt. Wyatt Hoagland transported him to a hospital, where Stoetzel submitted to a blood test. The blood test was then sent to a laboratory to determine Stoetzel's blood alcohol content.

On March 2, 2006, Sergeant Hoagland received the results of the blood test. The test results indicated that Stoetzel had a blood alcohol content of .19 of a gram of alcohol per 100 milliliters of blood. After receiving the test results, the sergeant completed the "Notice/Sworn Report/Temporary License" form (sworn report) and forwarded it to the Department.

On March 6, 2006, the Department received the sworn report. However, the sworn report did not indicate the date that Sergeant Hoagland had received the blood test results. The Department returned the report to the sergeant, requesting that he provide the omitted information.

On March 7, 2006, the Department sent Stoetzel a "Notice of Administrative License Revocation Temporary License." In response to this notice, Stoetzel timely requested an administrative hearing.

On March 17, 2006, the Department received an amended sworn report from Sergeant Hoagland. The amended report was the same sworn report the Department received on March 6, but it had been altered to include the date the sergeant received the blood test results ("3-2-06").

On March 31, 2006, an administrative license revocation (ALR) hearing was held. At the hearing, Stoetzel objected to the admissibility of the sworn report. Stoetzel argued that pursuant to Neb. Rev. Stat. § 60-498.01(5)(a) (Reissue 2004), the sworn report was not timely received by the Department, because a properly completed sworn report was not received until March 17, which was more than 10 days after the sergeant had received the results of the blood test. The hearing officer overruled this objection and allowed the sworn report into evidence.

After the conclusion of the ALR hearing, the director of the Department revoked Stoetzel's operator's license and privilege to operate a motor vehicle in the State of Nebraska for a period of 1 year. Stoetzel challenged the revocation in the district court.

On May 17, 2006, a hearing was held in district court. At the hearing, Stoetzel again argued, inter alia, that the Department did not receive a timely submitted sworn report. Stoetzel further argued that as a result of the Department's failure to receive a timely submitted sworn report, it lacked jurisdiction to revoke Stoetzel's driver's license. The district court found that a properly completed sworn report was not received by the Department until more than 10 days after the sergeant received the blood test results and that the Department lacked jurisdiction to revoke Stoetzel's driver's license. As such, the court reversed the Department's revocation of Stoetzel's driver's license.

The Department timely appeals.

III. ASSIGNMENTS OF ERROR

On appeal, the Department alleges that the district court erred in determining that a properly completed sworn report was not timely submitted to the Department and in concluding that as a result of the untimely submission of the sworn report, the Department lacked jurisdiction to revoke Stoetzel's driver's license.

IV. ANALYSIS

1. Standard of Review

A judgment or final order rendered by a district court in a judicial review pursuant to the Administrative Procedure Act may be reversed, vacated, or modified by an appellate court for errors appearing on the record. *Robbins v. Neth*, 273 Neb. 115, 728 N.W.2d 109 (2007). When reviewing an order of the district court under the Administrative Procedure Act for errors appearing on the record, the inquiry is whether the decision conforms to the law, is supported by competent evidence, and is neither arbitrary, capricious, nor unreasonable. *Id.* Whether a decision conforms to the law is by definition a question of law,

in connection with which an appellate court reaches a conclusion independent of that reached by the lower court. *Id.*

Interpretation of statutes presents a question of law, and an appellate court is obligated to reach an independent conclusion, irrespective of the decision made by the court below, with deference to an agency's interpretation of its own regulations, unless plainly erroneous or inconsistent. *Morrissey v. Department of Motor Vehicles*, 264 Neb. 456, 647 N.W.2d 644 (2002), *disapproved on other grounds, Hahn v. Neth*, 270 Neb. 164, 699 N.W.2d 32 (2005); *Scott v. State*, 13 Neb. App. 867, 703 N.W.2d 266 (2005).

2. Untimely Submission of Sworn Report

The Department first asserts that the district court erred in determining that a properly completed sworn report was not timely submitted to the Department. The Department alleges that it received a properly completed sworn report within 10 days after Sergeant Hoagland, as the arresting officer, obtained the results of the blood test, pursuant to § 60-498.01(5)(a). We disagree.

[1] While the Department did receive a sworn report within 10 days after the arresting officer obtained the blood test results, the officer omitted from this report the date that he obtained the blood test results. We hold that § 60-498.01(5)(a) requires that a sworn report include the date the officer received the blood test results. We hold this because without this information as a requirement of the sworn report, there is no way for the Department to determine, in any given case, whether the officer in fact submitted the sworn report within 10 days after obtaining the blood test results. Therefore, we find that the initial sworn report was not properly completed and was not sufficient to confer authority on the Department to begin license revocation proceedings.

The Department did not receive an amended report which included the date the arresting officer obtained the blood test results until 15 days after the officer had obtained the blood test results. Section 60-498.01(5)(a) requires that the arresting officer submit the sworn report to the Department within 10 days after obtaining the blood test results. As a result, the

amended report was untimely, since it was not received by the Department within 10 days of the date the officer received the blood test results.

Furthermore, as we will discuss more fully in the following section of the analysis, the amended report did not constitute a "sworn report" as required by § 60-498.01(5)(a), because the change to the report was not properly notarized.

(a) March 6, 2006, Sworn Report

In an ALR proceeding, if the Department can establish that the arresting officer provided a sworn report containing the recitations required by the applicable statute, it has made a prima facie case for license revocation, and the director is not required to prove that the recitations contained in the sworn report are true. See *Hahn v. Neth, supra*. Because of the significant weight given to the sworn report in an ALR proceeding, it is essential that the report is properly completed. See *id.*

[2] In *Hahn v. Neth*, 270 Neb. 164, 699 N.W.2d 32 (2005), the Nebraska Supreme Court examined the issue of whether an incomplete sworn report was sufficient to confer authority on the director of the Department to revoke a motorist's operator's license. The court concluded that the test to determine whether an omission on a sworn report is a jurisdictional defect rather than a technical one "should be whether, notwithstanding the omission, the sworn report conveys the information required by the applicable statute." *Id.* at 171, 699 N.W.2d at 38.

In the instant case, the record reveals that Stoetzel was arrested for driving under the influence on February 18, 2006. Subsequent to his arrest, he submitted to a blood test. This blood test was sent to a laboratory for analysis, and the results of the test were therefore not immediately available.

The arresting officer received the results of Stoetzel's blood test on March 2, 2006. The officer submitted a report to the Department on March 6, approximately 4 days after he received the blood test results. However, the officer neglected to complete the portion of the form which asked when he received the results of the blood test from the laboratory.

Section 60-498.01(5)(a) provides the procedural steps for revoking a person's license when, like Stoetzel, the person

submitted to a blood test, but the results of that blood test were not available while the person was still in custody. Section 60-498.01(5)(a) states:

> If the results of a chemical test indicate the presence of alcohol in a concentration specified in section 60-6,196, the results are not available to the arresting peace officer while the arrested person is in custody, and the notice of revocation has not been served as required by subsection (4) of this section, the peace officer shall forward to the director a sworn report containing the information prescribed by subsection (3) of this section within ten days after receipt of the results of the chemical test. If the sworn report is not received within ten days, the revocation shall not take effect.

Pursuant to the Nebraska Supreme Court's decision in *Hahn*, we must determine whether the original report submitted to the Department on March 6, 2006, conveyed the information required by § 60-498.01(5)(a) in order to decide whether or not the Department received a properly completed and timely submitted sworn report. If the March 6 sworn report lacked information mandated by statute, it could not confer authority on the Department to revoke Stoetzel's driver's license.

The Department argues that the March 6, 2006, report was properly completed and timely filed. In making its argument, the Department cites to the language of § 60-498.01(5)(a) which requires the arresting officer to complete a sworn report containing the information prescribed by § 60-498.01(3). Section 60-498.01(3) requires the following information to be in a sworn report: (a) that a person was arrested as described in subsection (2) of Neb. Rev. Stat. § 60-6,197 (Reissue 2004) and the reasons for such arrest, (b) that the person was requested to submit to the required test, (c) that the person submitted to the test, and (d) the type of test to which he or she submitted and the results of the test.

The Department contends that the arresting officer supplied all of the necessary information required by § 60-498.01(3) and that, as such, the original report was sufficient to confer authority to revoke Stoetzel's driver's license. The Department further asserts that the date the arresting officer received the blood

test results is not statutorily required by the language of either § 60-498.01(3) or (5)(a). We disagree.

While the statutory language of § 60-498.01(5)(a) does not explicitly require on the sworn report the inclusion of the date the arresting officer received the blood test results, the language does state that revocation proceedings shall not take effect if the report is received more than 10 days after the officer receives the test results. Implicit in the statutory language, then, is that the Department must know when the officer received the test results in order to know if it has authority to begin license revocation proceedings. Because the officer omitted this information from the March 6, 2006, report, the Department did not know, and could not have known, whether or not it had the authority to institute revocation proceedings. As a result, the March 6 sworn report did not convey all of the statutorily required information and did not confer authority on the Department to revoke Stoetzel's driver's license.

We also note that the Department provides the sworn report to arresting officers and that such form is designed to facilitate the accurate completion of the sworn report. The sworn report filled out by the arresting officer in this case provided space for the officer to indicate the date he received Stoetzel's blood test results. A box, located next to the space asking for the blood test results, contains the preprinted phrase "Date Blood Test Results Received:" and space for the officer to fill in the relevant date. The arresting officer left this box blank when he first submitted the report to the Department on March 6, 2006.

We digress for a moment to point out that the district court based its reversal of the Department's decision to revoke Stoetzel's driver's license on its finding that the arresting officer incorrectly completed the March 6, 2006, report when he stated that Stoetzel failed a breath test rather than a blood test. The district court found that this was not a "technical error" and that, as a result, the March 6 report was not properly completed.

However, the record indicates that the arresting officer made this change prior to the first submission of the report on March 6, 2006. Both the March 6 report and the March 17 report reveal that the officer initially marked a box to indicate that Stoetzel failed a breath test. The officer then crossed out this

marking, initialed next to the change, and marked a box to indicate that Stoetzel had, in fact, failed a blood test. Because this change was present on the March 6 report, it did not affect a determination of whether or not the March 6 report was properly completed. However, based on our discussion above, the district court reached the correct result, albeit for the wrong reason, when it found that the March 6 sworn report was not properly completed and, thus, was not timely filed. A proper result will not be reversed merely because it was reached for the wrong reason. *In re Trust Created by Cease*, 267 Neb. 753, 677 N.W.2d 495 (2004).

We find that the March 6, 2006, report was not properly completed and was not sufficient to confer authority on the Department to revoke Stoetzel's driver's license, because the arresting officer omitted the date he obtained the blood test results from the report. Section 60-498.01(5)(a) requires that a properly completed sworn report include the date the arresting officer obtained the results of the blood test so that the Department knows whether or not it received the report within 10 days after the officer obtained the results of the blood test.

(b) March 17, 2006, Sworn Report

After receiving the original, incomplete report, the Department returned the report to the arresting officer, asking the officer to include the date that he received the blood test results. The officer amended the report by adding the date the blood test results were received, but did not submit the second report to the Department until March 17, 2006, 15 days after the officer received the blood test results on March 2. Because § 60-498.01(5)(a) requires the arresting officer to submit a report "within ten days after receipt of the results of the chemical test," we find the amended report to be untimely.

[3-5] In addition to finding that the arresting officer did not timely submit the amended report to the Department, we note that it appears this amended report is not "sworn," as is required by § 60-498.01(5)(a). A sworn report in an ALR proceeding is, by definition, an affidavit. *Valeriano-Cruz v. Neth*, 14 Neb. App. 855, 716 N.W.2d 765 (2006). See, also, *Hass v. Neth*, 265 Neb. 321, 657 N.W.2d 11 (2003). An affidavit is a written or

printed declaration or statement of facts, made voluntarily, and confirmed by the oath or affirmation of the party making it, taken before a person having authority to administer such oath or affirmation. *Id.* An affidavit must bear on its face, by the certificate of the officer before whom it is taken, evidence that it was duly sworn to by the party making the same. *Id.*

Neb. Rev. Stat. § 64-107 (Reissue 2003) empowers a notary public to administer oaths and affirmations in all cases and contemplates proof of those acts as follows: "Over his signature and official seal, he shall certify the performance of such duties so exercised and performed under the provisions of this section, which certificate shall be received in all courts of this state as presumptive evidence of the facts therein certified to."

The March 17, 2006, report revealed on its face that a notary had certified that the arresting officer swore to the veracity of the contents of the report when it was first completed on March 6. However, the amended report contained additional information. The arresting officer altered the March 6 report so that it included the date he received the blood test results. As such, the amended report should have been notarized again, to indicate on its face that the arresting officer swore to the veracity of all the information contained in the updated report, including the date the officer received the blood test results.

[6] However, while the amended report did contain the official seal of a notary, it did not contain the signature of the notary. After the arresting officer added to the report the date he received the blood test results, he signed his initials next to this information. A notary then affixed her seal above the newly added information and wrote the date above the seal. The notary did not sign the form. Section 64-107 mandates that a properly notarized document contain both the notary's signature and seal. Without both the signature and the seal, the report cannot be considered sworn, as is required by § 60-498.01(5)(a).

We conclude that the Department did not receive a properly completed and timely submitted sworn report. The March 6, 2006, report did not contain the date the arresting officer received the blood test results. Section 60-498.01(5)(a) mandates the inclusion of this information, and as a result, we find that the Department was without authority to institute revocation

proceedings upon receiving the March 6 report. In addition, the March 17 report was not timely submitted and was not sworn. We find there is no merit to this assignment of error.

3. Jurisdiction

The Department next asserts that the omission from the original sworn report of the date the arresting officer received the blood test results was merely a "technical defect" and that "its absence did not impede the conferral of jurisdiction on the Department." Brief for appellant at 9. We find that the language in § 60-498.01(5)(a) mandates that the sworn report be submitted to the Department within 10 days after the arresting officer receives the chemical test results, because a person arrested pursuant to this section does not receive prior notice of the possibility of revocation proceedings. If the sworn report is submitted after the 10-day period, the Department lacks jurisdiction to revoke a person's driver's license. We affirm the decision of the district court which found that the Department lacked jurisdiction to revoke Stoetzel's driver's license, because the Department did not receive a properly completed and timely submitted sworn report.

Section 60-498.01 provides the procedures for administratively revoking a person's driver's license. Specifically, § 60-498.01(2) provides the procedures for revoking a person's driver's license when the person refuses to submit to a chemical test of blood, breath, or urine; § 60-498.01(3) provides the procedures for revoking a person's driver's license when the person submits to a chemical test of blood or breath, the test discloses the presence of alcohol, and the test results are available to the arresting officer while the person is still in custody; and, as discussed above, § 60-498.01(5)(a) provides the procedures for revoking a person's driver's license when the results of a chemical test indicate the presence of alcohol and the results are not available while the person is still in custody.

Section 60-498.01(5)(a) provides:

> If the results of a chemical test indicate the presence of alcohol in a concentration specified in section 60-6,196, the results are not available to the arresting peace officer while the arrested person is in custody, and the notice of

> revocation has not been served as required by subsection (4) of this section, the peace officer shall forward to the director a sworn report containing the information prescribed by subsection (3) of this section within ten days after receipt of the results of the chemical test. *If the sworn report is not received within ten days, the revocation shall not take effect*.

(Emphasis supplied.) Under § 60-498.01(5)(a), the arrested person does not receive immediate notice of license revocation proceedings, because the results of the chemical test are not readily available. In these situations, the arrested person does not receive notice of the revocation until after the Department has received a sworn report from the arresting officer. Section 60-498.01(5)(b) requires the Department to serve notice of revocation on a person by certified or registered mail only *after* it has received a sworn report. It seems logical that because of this delay in notification, the Legislature included the last sentence of § 60-498.01(5)(a), which specifically precludes the Department from taking action if the sworn report is submitted after the 10-day period.

While § 60-498.01(2) and (3) also contain language instructing an arresting officer to submit a sworn report within 10 days, these sections provide for immediate notification of pending license revocation proceedings to an arrested person. Section 60-498.01(2) and (3) state that the arresting peace officer, as agent for the director, "shall verbally serve notice to the arrested person of the intention to immediately confiscate and revoke the operator's license of such person." In addition, § 60-498.01(2) and (3) do not contain language like that found in the last sentence of § 60-498.01(5)(a), which explicitly precludes the Department from beginning revocation proceedings if the sworn report is not submitted within 10 days.

For the sake of a thorough discussion, we know this court recently held that the 10-day time limitation set out in § 60-498.01(2) and (3) is directory and not mandatory and that the failure to strictly abide by the 10-day time limit does not invalidate license revocation proceedings or take away the jurisdiction of the Department. See, *Thomsen v. Nebraska Dept. of Motor Vehicles*, 16 Neb. App. 44, 741 N.W.2d 682 (2007);

Forgey v. Nebraska Dept. of Motor Vehicles, 15 Neb. App. 191, 724 N.W.2d 828 (2006).

In *Forgey*, we held that the language in § 60-498.01(2), which states that "[t]he arresting peace officer shall within ten days forward to the director a sworn report," was directory and not mandatory, because "there is no sanction attached to an officer's failure to file the sworn report with the Department within 10 days." 15 Neb. App. at 197, 724 N.W.2d at 833.

In *Thomsen*, we further explained our decision to make the time limitation in § 60-498.01(2) and (3) directory. In doing so, we specifically distinguished § 60-498.01(2) and (3) from § 60-498.01(5)(a):

> [U]nder § 60-498.01(5)(a), motorists do not receive notice at the time of arrest of the intention to confiscate and revoke, in contrast to the notice provided to motorists in situations controlled by [§§ 60-498.01(2) and] 60-498.01(3). . . . [S]ound policy reasons exist for requiring the time provision of § 60-498.01(5)(a) to be mandatory.

16 Neb. App. at 50, 741 N.W.2d at 686.

The reasons for requiring the 10-day time provision in § 60-498.01(5)(a) to be mandatory include both the statutory language of § 60-498.01(5)(a), precluding the Department from acting if the sworn report is not timely received, and the need for prompt notice of license revocation proceedings. Under § 60-498.01(5)(a), an arresting officer must submit a sworn report to the Department within 10 days of receiving the chemical test results, not only to ensure "the swift and certain revocation of the operator's license of any person who has shown himself or herself to be a health and safety hazard," as § 60-498.01(1) generally suggests, but also to promptly notify a driver that he or she is subject to such revocation proceedings.

[7] We hold that the 10-day time period for submitting a sworn report under § 60-498.01(5)(a) is mandatory and that if the sworn report is submitted after the 10-day period, the Department lacks jurisdiction to revoke a person's driver's license.

In the present case, Stoetzel submitted to a blood test, but the results of the test were not available while he was still in custody. He did not receive immediate notification that he was

subject to license revocation proceedings. The record reflects that on March 7, 2006, the Department sent a letter notifying Stoetzel of the pending revocation proceedings. As discussed in the previous section, the Department received a report from the arresting officer on March 6, but this report was not properly completed and was not sufficient to confer authority on the Department to institute revocation proceedings, because the officer neglected to include the date he obtained the blood test results and § 60-498.01(5)(a) requires such date on a properly completed sworn report. The Department did not receive a report which included the date the officer received the blood test results until March 17.

Accordingly, when the Department sent the notification letter to Stoetzel on March 7, 2006, it was only in receipt of the improperly completed March 6 report, and thus, it did not have the authority to begin license revocation proceedings pursuant to § 60-498.01(5)(a), which implicitly requires the Department to be in receipt of a properly completed sworn report before it can proceed. The statute does not provide an exception to this rule when the arrested person receives actual notice of revocation proceedings within 10 days after the arresting officer obtained the results of the blood test. Because the Department lacked the authority to begin the proceedings, the March 7 letter to Stoetzel was ineffectual and is of no consequence to our discussion of whether or not the Department had jurisdiction to institute revocation proceedings.

Furthermore, the Department never acquired the authority to revoke Stoetzel's driver's license, because it never received a properly completed and timely submitted sworn report. The amended report submitted to the Department on March 17, 2006, was untimely and was not sworn. As a result of these findings, we conclude that the Department lacked jurisdiction to institute license revocation proceedings against Stoetzel, and we find this assignment of error to be without merit.

V. CONCLUSION

We find that a properly completed sworn report was not timely submitted to the Department, because the original sworn report failed to include the date the arresting officer received

the blood test results and because the amended sworn report was received more than 10 days after the receipt of the blood test results and was not properly sworn. We also find that under § 60-498.01(5)(a), an arresting officer must submit a sworn report within 10 days after receiving the blood test results to provide the Department with jurisdiction over revocation proceedings. As such, we find that the Department failed to obtain jurisdiction to revoke Stoetzel's driver's license. We affirm the decision of the district court to reverse the Department's revocation of Stoetzel's license.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V.
RODNEY E. BLAKEMAN, APPELLANT.
744 N.W.2d 717

Filed January 29, 2008. No. A-07-103.

1. **Judgments: Speedy Trial: Appeal and Error.** As a general rule, a trial court's determination as to whether charges should be dismissed on speedy trial grounds is a factual question which will be affirmed on appeal unless clearly erroneous.
2. **Speedy Trial.** The final trial date under Neb. Rev. Stat. § 29-1207 (Reissue 1995) is determined by excluding the date the information was filed, counting forward 6 months, and then backing up 1 day.
3. **Speedy Trial: Indictments and Informations: Complaints.** Although Nebraska's speedy trial act expressly refers to indictments and informations, the act also applies to prosecutions on complaint.
4. **Speedy Trial: Complaints: Time.** In cases commenced and tried in county court, the 6-month period within which an accused must be brought to trial begins to run on the date the complaint is filed.
5. **Speedy Trial: Indictments and Informations: Time.** When considering felony offenses, it is well established that the statutory 6-month speedy trial period commences to run from the date the information is filed in district court and not from the time a complaint is filed in county court.

Appeal from the District Court for Box Butte County: BRIAN SILVERMAN, Judge. Affirmed.

Bell Island, of Island, Huff & Nichols, P.C., L.L.O., for appellant.

Jon Bruning, Attorney General, and Erin E. Leuenberger for appellee.

IRWIN, SIEVERS, and MOORE, Judges.

IRWIN, Judge.

I. INTRODUCTION

Rodney E. Blakeman appeals an order of the district court for Box Butte County, Nebraska, denying Blakeman's motion for absolute discharge on the basis of alleged statutory and constitutional speedy trial violations. Although Blakeman was ultimately charged in an information filed in the district court with two felonies, two misdemeanors, and three infractions, he seeks to have this court declare that the time during which a complaint and amended complaint were pending in county court should be "tacked" onto the time the information was pending to calculate the speedy trial time. With respect to the felony offenses, we find Blakeman's request directly contrary to established law. With respect to the misdemeanor and infraction offenses, we decline to determine whether the time should be tacked on, because even according to Blakeman's argument his speedy trial rights were not violated. We affirm.

II. BACKGROUND

We have reviewed the record in its entirety. Because the relevant factual matters in this appeal concern the dates of various filings, motions, and rulings thereon, we will set forth relevant factual matters in the discussion section below.

III. ASSIGNMENT OF ERROR

Blakeman's only assignment of error is that the district court erred in denying his motion for absolute discharge.

IV. ANALYSIS

1. STANDARD OF REVIEW

[1] As a general rule, a trial court's determination as to whether charges should be dismissed on speedy trial grounds is a factual question which will be affirmed on appeal unless clearly erroneous. *State v. Sommer*, 273 Neb. 587, 731 N.W.2d 566 (2007).

2. Statutory Right to Speedy Trial

Blakeman argues that the district court erred in failing to find a violation of "the speedy trial act." See brief for appellant at 4. As such, we first address whether the motion to discharge should have been sustained on statutory grounds, pursuant to Neb. Rev. Stat. § 29-1207 (Reissue 1995). We conclude that Blakeman's statutory speedy trial right was not violated with respect to the felony offense or with respect to the misdemeanor and infraction offenses.

[2-4] Section 29-1207 provides that every person charged for any offense shall be brought to trial within 6 months of the day the information is filed. The final trial date under § 29-1207 is determined by excluding the date the information was filed, counting forward 6 months, and then backing up 1 day. *State v. Schmader*, 13 Neb. App. 321, 691 N.W.2d 559 (2005). Although Nebraska's speedy trial act expressly refers to indictments and informations, the act also applies to prosecutions on complaint. See *id.* In cases commenced and tried in county court, the 6-month period within which an accused must be brought to trial begins to run on the date the complaint is filed. See *id.* If a defendant is not brought to trial before the running of the time for trial, as extended by excluded periods, he shall be entitled to his absolute discharge from the offense charged. *State v. Knudtson*, 262 Neb. 917, 636 N.W.2d 379 (2001).

(a) Felony Offenses

We first address the speedy trial calculation for the two felony offenses charged in the information. Based on a plain reading of existing authority, we conclude that the motion for discharge was properly denied concerning the felony offenses, because the clock did not properly start to run until the information was filed, approximately 3 months prior to Blakeman's motion for discharge.

[5] When considering felony offenses, it is well established that the statutory 6-month speedy trial period commences to run from the date the information is filed in district court and not from the time a complaint is filed in county court. See *State v. Hutton*, 11 Neb. App. 286, 648 N.W.2d 322 (2002). In *State v. Hutton*, this court applied that rule to a situation where

a complaint initially charged a felony shoplifting offense, an amended complaint was filed changing the charge to a misdemeanor shoplifting offense, and another amended complaint was filed changing the charge back to a felony shoplifting offense. In that situation, the clock did not start to run until an information was eventually filed in district court, and none of the time that any of the complaints were pending in county court was tacked on in calculating the 6-month speedy trial time.

In the instant case, the information charging Blakeman with two felony offenses, including felony driving under the influence, was filed on October 24, 2006. The fact that Blakeman was previously charged with misdemeanor driving under the influence in the initial complaint is comparable to the fact that the defendant in *State v. Hutton* was, for a time, charged with a misdemeanor offense instead of the felony offense. Just as we did in *State v. Hutton*, we conclude that the clock did not start to run until the information was filed in district court, regardless of what charges were alleged in the previous complaints filed in county court.

Because we conclude that the clock did not begin to run with respect to the two felony offenses until the information was filed in district court on October 24, 2006, Blakeman's motion for discharge filed on January 29, 2007, only came approximately 3 months after the clock began to run. The district court was not clearly erroneous in finding that the motion should be denied, with respect to the felony offense.

(b) Misdemeanor and Infraction Offenses

We next address the speedy trial calculation for the two misdemeanor offenses and the three infraction offenses. We conclude that even if Blakeman's argument that some period of time during which these offenses were pending in county court pursuant to a complaint should be included in the speedy trial calculation, the district court was not clearly erroneous in denying the motion for discharge. Even if Blakeman's argument has merit, an issue we explicitly decline to resolve, the 6-month time period would not have expired on January 29, 2007, when Blakeman filed his motion.

Blakeman argues that the lesson to be learned by a reading of *State v. Boslau*, 258 Neb. 39, 601 N.W.2d 769 (1999); *State v. Timmerman*, 12 Neb. App. 934, 687 N.W.2d 24 (2004); and *State v. Hutton, supra*, is that the clock should begin to run when the trial court has "the ability" to hear the matter. Brief for appellant at 5. Blakeman argues that when the initial complaint was filed, the county court had the ability to hear the misdemeanor and infraction offenses, and that accordingly, the clock should have started to run with respect to those offenses when the initial complaint was filed.

Blakeman argues that *State v. Timmerman, supra*, demonstrates that when felony and misdemeanor offenses are both charged together in a complaint, the clock does not start with respect to any of the offenses until the information is filed because including all of the offenses in the same charging document indicates an intent to try the misdemeanor offenses in the district court along with the felony offenses. In *State v. Timmerman*, this court held that "although the misdemeanors were originally charged in the county court, it [was] clear that the State intended that the misdemeanors be tried not in the county court, but in the district court along with the felony" that was also charged in the original complaint. 12 Neb. App. at 939, 687 N.W.2d at 28. Blakeman argues that the present case is different because the initial complaint did not charge any felony offenses, indicating an intent to try all of the misdemeanor and infraction offenses in the county court.

Even assuming, however, that we accept Blakeman's argument and consider the possibility that the clock could start to run with respect to the misdemeanor and infraction offenses when the initial complaint was filed, Blakeman's own logic would demonstrate that the 6-month period had not yet run when Blakeman filed his motion for discharge. If the initial complaint indicated an intent to try the misdemeanor offenses in county court, and if that indication of intent was sufficient to start the clock running, then the filing of the amended complaint charging felony offenses along with the misdemeanor and infraction offenses would indicate an intent to no longer try the misdemeanor and infraction offenses in county court. Rather,

the amended complaint would indicate an intent to proceed with trying all of the offenses in the district court. See *State v. Timmerman, supra*. Thus, the clock would "stop" when the amended complaint was filed in county court and would not start again until the information was filed in district court.

The initial complaint was filed on May 8, 2006. If we accept Blakeman's argument, the last day to bring him to trial would have been November 8, if there were no excludable time periods. As noted, however, accepting Blakeman's argument also means that the time between the filing of the amended complaint on August 18 and the filing of the information on October 24, a period of 67 days, would be considered excludable time. This would move the last day to bring Blakeman to trial to January 14, 2007. January 14, 2007, was a Sunday, so the proper date for our purposes would be January 15, 2007.

Additionally, Blakeman was granted a continuance from May 11 to May 18, 2006, a period of 7 days; and a continuance from July 6 to August 3, 2006, a period of 28 days. Adding these 35 days to the calculation would move the last day to bring Blakeman to trial to February 19, 2007.

We additionally note that Blakeman filed a motion for discovery on August 4, 2006. The record presented to us does not indicate whether that motion was ever ruled on or what impact it should have on the speedy trial calculations. As such, and because it is not necessary to our resolution, we need not consider this motion in our calculation.

At the very least, even assuming we accept Blakeman's argument that the clock should have started to run when the initial complaint was filed, the speedy trial time would not yet have expired when Blakeman filed his motion for absolute discharge. At the very least, the speedy trial time would not have expired before February 19, 2007, 21 days after Blakeman's motion was filed. We need not expressly determine whether Blakeman's argument does have merit, because even if it does, his argument on appeal is without merit. The district court was not clearly erroneous in overruling the motion to discharge with respect to the misdemeanor and infraction offenses.

3. Constitutional Speedy Trial

Although Blakeman's motion for discharge referenced both his statutory and constitutional speedy trial rights, his brief on appeal does not assign or argue any issue concerning his constitutional speedy trial right. As such, we will not further address the issue. See *State v. Karch*, 263 Neb. 230, 639 N.W.2d 118 (2002) (appellate court does not review questions concerning constitutional speedy trial right when not raised in both trial and appellate court).

V. CONCLUSION

We find no merit to Blakeman's assertions that the district court erred in denying his motion for discharge. We affirm.

Affirmed.

State of Nebraska, appellant, v.
Dennis E. Solomon, appellee.

744 N.W.2d 475

Filed January 29, 2008. No. A-07-297.

1. **Judgments: Appeal and Error.** When dispositive issues on appeal present questions of law, an appellate court has an obligation to reach an independent conclusion irrespective of the decision made by the court below.
2. **Judgments: Records.** Neither Neb. Rev. Stat. § 25-2729 (Reissue 1995) nor Neb. Rev. Stat. § 25-1301 (Reissue 1995) specifically require a file stamp for entry of judgment.
3. **Judgments: Final Orders: Records.** A journal entry signed by the judge and filed is all that Neb. Rev. Stat. § 25-2729(3) (Reissue 1995) requires for a final order.

Appeal from the District Court for Douglas County: John D. Hartigan, Jr., Judge. Sentence vacated, and cause remanded for resentencing.

Donald W. Kleine, Douglas County Attorney, and Jennifer Meckna for appellant.

Robert M. Schartz and Michael G. Monday, of Sodoro, Daly & Sodoro, P.C., for appellee.

IRWIN, SIEVERS, and MOORE, Judges.

SIEVERS, Judge.

After Dennis E. Solomon pled guilty to the underlying offense of driving while under the influence (DUI), a hearing was held to determine the validity for enhancement purposes of one of Solomon's three prior convictions for DUI. The district court found that one of the prior convictions was not a valid conviction for enhancement purposes, due to the lack of a file stamp on the docket entry or the order of probation. We granted the State's application to docket error proceedings, and the State now appeals the district court's decision.

FACTUAL AND PROCEDURAL BACKGROUND

On June 27, 2006, the Douglas County Attorney filed an information charging Solomon with DUI, fourth offense. In its information, the State alleged that the charge of DUI, fourth offense, is justified because Solomon was previously convicted of DUI on February 2, 1998, June 9, 2004, and July 9, 2005.

Solomon pled guilty to DUI, and the district court accepted Solomon's plea. At the enhancement hearing, the State offered certified copies of the three prior convictions. Solomon did not object to the 2004 or 2005 convictions, and they are not at issue here. However, Solomon moved to quash the 1998 conviction, arguing that the county court judge in the 2004 and 2005 convictions found that the 1998 conviction was not valid for enhancement purposes, thereby raising a claim of collateral estoppel, sometimes referred to as issue preclusion, or res judicata. Solomon also argued that Neb. Rev. Stat. § 25-2729 (Reissue 1995) and *State v. Wilcox*, 9 Neb. App. 933, 623 N.W.2d 329 (2001), require that the journal entry for the 1998 conviction be file stamped to be a final, appealable order, which it was not, making such invalid for enhancement purposes.

The district court sustained Solomon's objection to using the 1998 conviction for enhancement purposes, because the guilty finding in that case did not contain a file stamp and date. As a result, the district court found Solomon guilty of DUI, third offense. The district court later sentenced Solomon to 2 years of intensive supervision probation, with the first 30 days to be spent in the Douglas County Correctional Center.

ASSIGNMENTS OF ERROR

The State alleges that the district court erred in finding that the 1998 prior conviction was invalid for enhancement purposes due to the lack of a file stamp on the journal entry or order of probation.

STANDARD OF REVIEW

[1] When dispositive issues on appeal present questions of law, an appellate court has an obligation to reach an independent conclusion irrespective of the decision made by the court below. *State v. Alba*, 270 Neb. 656, 707 N.W.2d 402 (2005).

ANALYSIS

The bill of exceptions before us contains the following documents regarding Solomon's 1998 conviction, all of which bear the file number 97-35208: a file-stamped complaint and information dated December 10, 1997, charging Solomon with DUI; a signed journal entry and order dated February 2, 1998, showing that Solomon pled guilty to DUI and was sentenced to probation; and a signed order of probation dated February 2, 1998. These latter two documents are not file stamped. Finally, there is a file-stamped "Satisfaction of Judgment and Sentence" dated September 24, 1998.

The district court stated that "[b]ecause [exhibit 1] does not contain [a file] stamp, it is not possible to conclude that the entry of judgment or final order did occur in [the February 1998] prosecution, even though there is another entry indicating that [Solomon] completed a probationary sentence." The district court based its decision on *State v. Wilcox, supra*, and "the statute." We presume the district court was referring to § 25-2729(3), which we discussed in *State v. Wilcox, supra*.

However, the district court's reliance on *State v. Wilcox, supra*, is misplaced, because *Wilcox* relied on § 25-2729(3) (Cum. Supp. 2000), a version which became effective on August 28, 1999—after Solomon's 1998 conviction. The version of the statute discussed in *Wilcox* provides in part:

> The entry of a judgment or final order occurs when the clerk of the court places the file stamp and date upon the judgment or final order. For purposes of determining the

> time for appeal, the date stamped on the judgment or final order shall be the date of entry.

§ 25-2729(3) (Cum. Supp. 2000). That statute's counterpart, Neb. Rev. Stat. § 25-1301 (Cum. Supp. 2000), also did not become effective until August 28, 1999. That version of § 25-1301 provides in part:

> (2) Rendition of a judgment is the act of the court, or a judge thereof, in making and signing a written notation of the relief granted or denied in an action.
>
> (3) The entry of a judgment, decree, or final order occurs when the clerk of the court places the file stamp and date upon the judgment, decree, or final order. For purposes of determining the time for appeal, the date stamped on the judgment, decree, or final order shall be the date of entry.

[2,3] Solomon's 1998 conviction occurred prior to August 28, 1999. Therefore, we look to the versions of the statutes that were in effect at the time of Solomon's 1998 conviction. In 1998, § 25-2729(3) (Reissue 1995) provided:

> The time of rendition of a judgment or making of a final order is the time at which the action of the judge in announcing the judgment or final order is noted on the trial docket or, if the action is not noted on the trial docket, the time at which the journal entry of the action is signed by the judge and filed.

And § 25-1301 (Reissue 1995) provided in part:

> (2) Rendition of a judgment is the act of the court, or a judge thereof, in pronouncing judgment, accompanied by the making of a notation on the trial docket, or one made at the direction of the court or judge thereof, of the relief granted or denied in an action.
>
> (3) Entry of a judgment is the act of the clerk of the court in spreading the proceedings had and the relief granted or denied on the journal of the court.

Thus, at the time of Solomon's conviction in 1998, neither § 25-2729 nor § 25-1301 specifically required a file stamp for entry of judgment. Our record contains a signed journal entry and order dated February 2, 1998, showing that Solomon pled guilty to DUI and was sentenced to probation. A journal entry

signed by the judge and filed is all that § 25-2729(3) required for a final order in 1998. And exhibit 1, containing the pleadings and orders from the 1998 conviction, was a certified copy of "the original record on file in the Douglas County Court." Thus, the February 2, 1998, journal entry was signed by a judge and filed. Because the 1998 conviction complies with § 25-2729, it was valid for enhancement purposes. As a result, Solomon had three prior convictions, and the June 27, 2006, charge should have resulted in a conviction for DUI, fourth offense.

In his brief, Solomon argues that even if the district court erred in finding that Solomon's 1998 conviction is invalid for enhancement purposes, the State is collaterally estopped from using the conviction for enhancement. We disagree.

Collateral estoppel may be applied where an identical issue was decided in a prior action, there was a judgment on the merits which was final, the party against whom the doctrine is to be applied is a party or is in privity with a party to the prior action, and there was an opportunity to fully and fairly litigate the issue in the prior litigation. *State v. Gerdes*, 233 Neb. 528, 446 N.W.2d 224 (1989). However, the record before us is insufficient to show that the identical issue was decided in a prior action or even that there was an opportunity to fully and fairly litigate the issue in the prior litigation. For instance, we do not know if in the 2004 case, a "second offense" original charge was dropped in exchange for a guilty plea to DUI, first offense. And for the 2005 case, our record shows only that (1) the information charging Solomon with DUI, third offense, alleged prior convictions in 1998 and 2004, and (2) at trial, the court received two out of three exhibits offered. However, the record is not clear as to the content of the exhibits offered and received in the 2005 case. Thus, we cannot say with certainty that Solomon's 1998 conviction was not used to enhance his 2005 conviction. Given these shortcomings in the evidentiary record, Solomon has not established the prerequisites for a collateral estoppel argument to prevent use of the 1998 conviction in his prosecution.

CONCLUSION

For the reasons stated above, we find that Solomon's 1998 conviction is valid for enhancement purposes. As a result, Solomon had three prior convictions, and the June 27, 2006, charge should have resulted in a conviction for DUI, fourth offense. Therefore, we vacate the sentence and remand this cause to the district court for resentencing of Solomon for DUI, fourth offense. See *State v. Nelson*, 262 Neb. 896, 636 N.W.2d 620 (2001) (holding that state and federal double jeopardy provisions do not prohibit habitual criminal enhancement on remand from appellate court).

SENTENCE VACATED, AND CAUSE REMANDED FOR RESENTENCING.

DAVID L. FREDERICK AND CAROL FREDERICK, HUSBAND AND WIFE, AND DOUGLAS E. MERZ, INDIVIDUALLY AND ON BEHALF OF ALL FORMER AND CURRENT STOCKHOLDERS OF SALEM GRAIN CO., INC. A NEBRASKA CORPORATION, APPELLEES, V. JOHN SEEBA AND RITA SEEBA, HUSBAND AND WIFE, DOING BUSINESS AS J&R TRAILERS AND R.J.'S MOBILE POWER WASHING, APPELLANTS.

745 N.W.2d 342

Filed February 5, 2008. No. A-06-272.

1. **Judgments: Jurisdiction: Appeal and Error.** A jurisdictional question which does not involve a factual dispute is determined by an appellate court as a matter of law, which requires the appellate court to reach a conclusion independent of the lower court's decision.
2. **Jurisdiction: Appeal and Error.** Before reaching the legal issues presented for review, it is the duty of an appellate court to determine whether it has jurisdiction over the matter before it.
3. **Final Orders: Appeal and Error.** The test of finality of an order of judgment for the purpose of appeal is whether there was a final order entered by the tribunal from which the appeal is taken.
4. ____: ____. The three types of final orders which may be reviewed on appeal are (1) an order which affects a substantial right and which determines the action and prevents a judgment, (2) an order affecting a substantial right made during a special proceeding, and (3) an order affecting a substantial right made on summary application in an action after judgment is rendered.

5. **Words and Phrases.** A substantial right is an essential legal right, not a mere technical right.
6. **Final Orders: Appeal and Error.** A substantial right is affected if the order affects the subject matter of the litigation, such as diminishing a claim or defense that was available to an appellant prior to the order from which an appeal is taken.
7. **Rules of the Supreme Court: Pretrial Procedure: Appeal and Error.** An order imposing a money judgment for attorney fees and expenses for discovery violations pursuant to Neb. Ct. R. of Discovery 37(a)(4) does not affect a "substantial right" as required by Neb. Rev. Stat. § 25-1902 (Reissue 1995).
8. **Jurisdiction: Appeal and Error.** An appellate court has the independent duty to determine whether or not jurisdiction over an appeal exists.
9. **Jurisdiction: Final Orders: Appeal and Error.** Generally, in the absence of a final order from which an appeal may be taken, the appeal must be dismissed for lack of jurisdiction. However, there is an exception to this rule which provides for appellate review of interlocutory orders that fall within that small class which finally determine claims of right separable from, and collateral to, rights asserted in the action, too important to be denied review and too independent of the cause itself to require that appellate consideration be deferred until the whole case is adjudicated.
10. **Final Orders: Appeal and Error.** There are three elements that must be met for an order to fall within the collateral order doctrine: The order must conclusively determine the disputed question, resolve an important issue completely separate from the merits of the action, and be effectively unreviewable on appeal from a final judgment.

Appeal from the District Court for Richardson County: DANIEL BRYAN, JR., Judge. Appeal dismissed.

John M. Guthery and Shawn P. Dontigney, of Perry, Guthery, Haase & Gessford, P.C., L.L.O., for appellants.

J.L. Spray and Robin L. Spady, of Mattson, Ricketts, Davies, Stewart & Calkins, for appellees.

INBODY, Chief Judge, and CARLSON and CASSEL, Judges.

INBODY, Chief Judge.

INTRODUCTION

John Seeba and Rita Seeba appeal from the Richardson County District Court's award of $11,732.75 in attorney fees and expenses for discovery violations pursuant to Neb. Ct. R. of Discovery 37(a)(4) (rev. 2000). For the reasons set forth herein, we dismiss this case for lack of jurisdiction.

STATEMENT OF FACTS

The instant case involves a shareholder derivative action brought against the Seebas by the appellees, David L. Frederick, Carol Frederick, and Douglas E. Merz, individually and on behalf of all former and current stockholders of Salem Grain Company, Inc. On February 18, 2005, the appellees filed a motion to compel which was granted by the district court on March 23, except for those claims withdrawn from the court's consideration by the appellees.

The appellees filed a second motion to compel on October 12, 2005. A hearing thereon was held on November 29, at which time the appellees informed the court that the Seebas had complied with one request listed in the motion to compel and thus were withdrawing that request. On December 13, the district court again compelled the Seebas to comply with the discovery requests, except for one request which was overruled.

At the November 29, 2005, hearing, appellees made a motion for attorney fees and sanctions against the Seebas. A hearing thereon was held on January 24, 2006. On February 14, the district court entered a money judgment for $11,732.75 on behalf of the appellees and against the Seebas jointly and severally for attorney fees and expenses in accordance with Nebraska's discovery rule 37(a)(4). The Seebas have appealed.

ASSIGNMENT OF ERROR

On appeal, the Seebas contend, restated, that the district court erred in sanctioning them $11,732.75 in attorney fees and expenses for discovery violations.

STANDARD OF REVIEW

[1] A jurisdictional question which does not involve a factual dispute is determined by an appellate court as a matter of law, which requires the appellate court to reach a conclusion independent of the lower court's decision. *Hallie Mgmt. Co. v. Perry*, 272 Neb. 81, 718 N.W.2d 531 (2006); *State of Florida v. Countrywide Truck Ins. Agency*, 270 Neb. 454, 703 N.W.2d 905 (2005).

ANALYSIS

[2] Before reaching the legal issues presented for review, it is the duty of an appellate court to determine whether it has jurisdiction over the matter before it. *In re Guardianship of Sophia M.*, 271 Neb. 133, 710 N.W.2d 312 (2006).

Final Order Under § 25-1902.

[3,4] The test of finality of an order of judgment for the purpose of appeal is whether there was a final order entered by the tribunal from which the appeal is taken. See *Williams v. Baird*, 273 Neb. 977, 735 N.W.2d 383 (2007). The three types of final orders which may be reviewed on appeal are (1) an order which affects a substantial right and which determines the action and prevents a judgment, (2) an order affecting a substantial right made during a special proceeding, and (3) an order affecting a substantial right made on summary application in an action after judgment is rendered. *In re Guardianship of Sophia M., supra*. See, Neb. Rev. Stat. § 25-1902 (Reissue 1995); *Williams v. Baird, supra*.

We note that the district court's February 14, 2006, order was not an order which determined the action and prevented a judgment and was not an order made on summary application in an action after judgment had been rendered. The Seebas concede as much in their brief. Therefore, we focus our discussion on whether the district court's order is an order affecting a substantial right made during a special proceeding.

[5,6] A "substantial right" is "an essential legal right, not a mere technical right. A substantial right is affected if the order affects the subject matter of the litigation, such as diminishing a claim or defense that was available to an appellant prior to the order from which an appeal is taken." *In re Guardianship of Sophia M.*, 271 Neb. at 138, 710 N.W.2d at 316.

In *Cunningham v. Hamilton County*, 527 U.S. 198, 119 S. Ct. 1915, 144 L. Ed. 2d 184 (1999), the U.S. Supreme Court considered whether an order imposing sanctions based on Fed. R. Civ. P. 37(a) against an attorney in the amount of $1,494, representing costs and fees for discovery violations, was a "final decision" for the purposes of appeal. The Court held that it was not and noted that a Fed. R. Civ. P. 37(a) sanctions order

is often intertwined with the merits of the action, which may require a reviewing court to inquire into the importance of the information sought or the adequacy of truthfulness of a response in order to evaluate the appropriateness of sanctions.

Further, the U.S. Supreme Court noted that to permit an immediate appeal from a sanctions order would undermine the very purposes of Fed. R. Civ. P. 37(a), which was designed to protect courts and opposing parties from delaying or harassing tactics during the discovery process, because such appeals "would undermine trial judges' discretions to structure a sanction in the most effective manner." 527 U.S. at 209. Immediate appeals of sanctions might cause trial judges not to sanction attorneys in order to avoid litigation delays. Further, each new sanction would give rise to a new appeal, forestalling resolution of the case. The court noted that delay and piecemeal appeals were the very types of results that the final judgment rule was designed to prevent.

[7] In the instant case, the district court's order entered a money judgment for $11,732.75 in favor of appellees. Such an order does not affect the subject matter of the litigation, such as diminishing a claim or defense available to the party or in any way affect the ability to advance or defend the lawsuit. Further, the filing of a direct appeal is sufficient to protect their interests. Thus, an order imposing a money judgment for attorney fees and expenses for discovery violations pursuant to Nebraska's discovery rule 37(a)(4) does not affect a "substantial right" as required by § 25-1902. Consequently, the order appealed from in this case is not a final order.

Collateral Order Doctrine.

[8] Although the Seebas contend that the collateral order doctrine is not applicable in this case, an appellate court has the independent duty to determine whether or not jurisdiction over an appeal exists. See *Hallie Mgmt. Co. v. Perry*, 272 Neb. 81, 718 N.W.2d 531 (2006). Thus, we consider whether the collateral order doctrine is applicable to the instant case.

[9] Generally, in the absence of a final order from which an appeal may be taken, the appeal must be dismissed for lack of jurisdiction. *Id.* However, there is an exception to this rule

which provides for appellate review of interlocutory orders that fall within "'that small class which finally determine claims of right separable from, and collateral to, rights asserted in the action, too important to be denied review and too independent of the cause itself to require that appellate consideration be deferred until the whole case is adjudicated.'" *Id.* at 85, 718 N.W.2d at 534 (quoting *Cohen v. Beneficial Loan Corp.*, 337 U.S. 541, 69 S. Ct. 1221, 93 L. Ed. 1528 (1949)). The Nebraska Supreme Court has also noted that the U.S. Supreme Court has emphasized the modest scope of the collateral order doctrine, explaining that

> "'the "narrow" exception should stay that way and never be allowed to swallow the general rule . . . that a party is entitled to a single appeal, to be deferred until final judgment has been entered, in which claims of district court error at any stage of the litigation may be ventilated.'"

Williams v. Baird, 273 Neb. 977, 983-84, 735 N.W.2d 383, 390 (2007) (quoting *Hallie Mgmt. Co. v. Perry, supra*). Accord *State v. Pratt*, 273 Neb. 817, 733 N.W.2d 868 (2007).

[10] The Nebraska Supreme Court has stated:

> The U.S. Supreme Court has set forth three elements that must be met for an order to fall within the collateral order doctrine: "[T]he order must conclusively determine the disputed question, resolve an important issue completely separate from the merits of the action, and be effectively unreviewable on appeal from a final judgment."

Hallie Mgmt. Co. v. Perry, 272 Neb. at 85-86, 718 N.W.2d at 535 (quoting *Coopers & Lybrand v. Livesay*, 437 U.S. 463, 98 S. Ct. 2454, 57 L. Ed. 2d 351 (1978)).

In *Hallie Mgmt. Co. v. Perry, supra*, the Nebraska Supreme Court considered whether the collateral order doctrine applied to a discovery order compelling disclosure of documents claimed to be protected by the attorney-client privilege and work product doctrine. The court held that the collateral order doctrine was not applicable because the appellant could not establish that the district court's order was effectively unreviewable upon final judgment. Although the court acknowledged that harm that may occur in delaying an occasional erroneous discovery order, such harm was outweighed by the delay and disruption that

would occur in the litigation process if interlocutory appeals were allowed from every discovery order which claimed to implicate privilege.

In the instant case, the Seebas cannot meet the third condition of the collateral order doctrine, i.e., that the order is effectively unreviewable upon final judgment. Once a final determination of the merits of the case has been decided, the Seebas can appeal the imposition of attorney fees and expenses at that time, and if the appellate court determines that an error was made, the remedies available to the Seebas after appeal from a final judgment are sufficient to adequately protect their interests. Therefore, this appeal is not reviewable under the collateral order doctrine.

CONCLUSION

Having found that no final order exists in the instant case and the appeal is not reviewable under the collateral order doctrine, we lack jurisdiction over this appeal. Thus, the appeal is dismissed.

APPEAL DISMISSED.

JENNIFER LYNN HONGSERMEIER, APPELLEE, V.
RONALD D. DEVALL AND TONYA L. DEVALL,
HUSBAND AND WIFE, APPELLANTS.
744 N.W.2d 481

Filed February 5, 2008. No. A-06-521.

1. **Specific Performance: Equity: Appeal and Error.** An action for specific performance sounds in equity, and on appeal, an appellate court tries factual questions de novo on the record and, as to questions of both fact and law, is obligated to reach a conclusion independent from the conclusion reached by the trial court.
2. **Summary Judgment.** Summary judgment is proper when the pleadings and evidence admitted at the hearing disclose that there is no genuine issue as to any material fact or as to the ultimate inferences that may be drawn from those facts and that the moving party is entitled to judgment as a matter of law.
3. **Summary Judgment: Appeal and Error.** In reviewing a summary judgment, an appellate court views the evidence in the light most favorable to the party against whom the judgment is granted and gives such party the benefit of all reasonable inferences deducible from the evidence.

4. **Contracts: Conveyances: Real Estate: Options to Buy or Sell.** A right of first refusal, rather than an option to purchase real estate, is created by an agreement which (1) contains no terms or conditions of sale; (2) fails to indicate that the party interested in purchasing real estate has an absolute right to demand conveyance of the property at any time prior to the owner's decision to sell it; and (3) implements the word "first" to indicate that if the owner decides to sell the real estate, he or she is compelled to offer it first to the other party to the agreement.
5. **Real Estate: Vendor and Vendee: Consideration: Notice: Words and Phrases.** A good faith purchaser of land is one who purchases for valuable consideration without notice of any suspicious circumstances which would put a prudent person on inquiry.
6. **Real Estate: Vendor and Vendee: Equity.** The general rule is that a purchaser of real estate takes subject to outstanding equitable interests in the property, which are enforceable against him to the same extent they are enforceable against the vendor, where the purchaser is not entitled to protection as a bona fide purchaser.
7. **Real Estate: Vendor and Vendee: Consideration: Notice: Proof.** The burden of proof is upon a litigant who alleges that he or she is a good faith purchaser to prove that he or she purchased the property for value and without notice; this burden includes proving that the litigant was without notice, actual or constructive, of another's rights or interest in the land.
8. **Real Estate: Vendor and Vendee: Claims: Notice.** To qualify as a bona fide purchaser of land, one must actually have paid the purchase money before he or she received notice of a claim against the land.
9. **Specific Performance: Proof.** A party seeking specific performance must show his or her right to the relief sought, including proof that the party is ready, able, and willing to perform his or her obligations under the contract.
10. **Summary Judgment: Proof.** A party moving for summary judgment must make a prima facie case by producing enough evidence to demonstrate that the movant is entitled to judgment if the evidence were uncontroverted at trial.
11. ____: ____. Once the moving party makes a prima facie case, the burden to produce evidence showing the existence of a material issue of fact that prevents judgment as a matter of law shifts to the party opposing the motion.
12. **Improvements: Equity: Proof.** As a general rule, in order that one may recover compensation for improvements made on another's land, as equitable relief, three concurrent elements must be shown to exist: (1) The occupant must have made the improvements in good faith; (2) he must have been in possession, actual or constructive, adversely to the title of the true owner; and (3) his possession must have been held under color or claim of title.
13. **Improvements: Title: Notice.** An occupant of land is not a possessor in good faith and hence is not entitled to compensation for improvements which he makes thereon after he has notice or knowledge that his title is defective, or notice or knowledge of an adverse title or claim to the property in another.

Appeal from the District Court for Hamilton County: MICHAEL OWENS, Judge. Affirmed.

Patrick A. Brock, of Cunningham, Blackburn, Francis, Brock & Cunningham, for appellants.

Tanya J. Janulewicz, of Leininger, Smith, Johnson, Baack, Placzek, Steele & Allen, for appellee.

IRWIN, SIEVERS, and MOORE, Judges.

MOORE, Judge.

INTRODUCTION

Ronald D. Devall and Tonya L. Devall, husband and wife, appeal from an order of the district court for Hamilton County, which granted summary judgment in favor of Jennifer Lynn Hongsermeier. The court found that Jennifer had a valid right of first refusal with regard to any offer to purchase certain real property and that the Devalls were not good faith purchasers of the property in question. The court ordered the Devalls to convey the property to Jennifer upon receipt from her of consideration consistent with the terms of the right of first refusal. For the reasons set forth herein, we affirm.

BACKGROUND

In February 2003, Jennifer; her father, Ivan Hongsermeier; and her uncle, Wayne Hongsermeier, entered into a memorandum of understanding. The memorandum was apparently part of an agreement between Ivan and Wayne to dissolve a partnership between them. As part of the agreement, the tract of real estate in Hamilton County that is subject to this lawsuit was conveyed to Wayne. The conveyance to Wayne was subject to a 10-year lease with Jennifer as lessee, which lease required Jennifer to pay the real estate taxes on the property. Jennifer was also granted a right of first refusal with respect to the real estate as follows:

> In the event that Wayne, or any person or persons claiming from Wayne, receive a bona fide offer for the purchase of their interest in the property described above and desire to accept the same, they shall notify Jennifer, in writing, of the receipt of such offer, and Jennifer shall have thirty (30) days in which to notify the party desiring to sell his or her

> interest in the subject property of her desire to purchase the subject property upon the same terms and conditions as the bona fide offer. In the event that Jennifer exercises her right of first refusal within the time herein provided, the party desiring to sell his or her interest in the subject real estate shall convey marketable title to Jennifer upon the same terms and conditions as the bona fide offer. In the event that Jennifer does not exercise her right of first refusal within the time provided hereinabove, the party desiring to sell his or her interest in the subject property may proceed to sell his or her interest in the subject real estate pursuant to the terms and conditions of the bona fide offer, without further restriction.

Wayne and Jennifer entered into a written 10-year farm lease for the property on May 2. Jennifer's right of first refusal was also set forth in the farm lease. The memorandum of understanding was filed of record with the Hamilton County clerk on November 22, 2004.

On October 15, 2004, Wayne entered into a purchase agreement with David Dalton and Teresa Dalton for sale of the property for $185,000. Wayne's real estate broker, Melvin Meyer, was made aware of Jennifer's lease and right of first refusal at the time. Jennifer was notified of this offer. Ultimately, Jennifer did not have the financial resources to meet the Dalton offer, but the Daltons still declined to complete the transaction due to Jennifer's existing leasehold interest.

On December 9, 2004, Wayne and the Devalls entered into an agreement to purchase the property for $181,500. Under the terms of the Devall agreement, closing was to occur on January 28, 2005. Prior to closing, the Devalls became aware of the farm lease and the contents of the memorandum of understanding. Because the Devalls were concerned about the leasehold interest, they negotiated a lower price with Wayne of $160,000. Jennifer's attorney, Galen Stehlik, sent a letter to Meyer dated January 27, 2005, which stated:

> I wanted to communicate with you, in writing, and advise you that Jennifer . . . did not exercise her right of first refusal with the respect to [sic] real estate you have

> listed for Wayne . . . . Accordingly, the Right of First Refusal that appears in the matter of public record has not been exercised, and the property can be sold without any further reference to the Right of First Refusal.

On January 28, the Devalls closed the transaction and received a joint tenancy warranty deed to the premises, which deed was filed of record on February 1.

The Devalls sent Jennifer a letter, dated March 11, 2005, demanding rent for the farm ground and informing Jennifer that the Devalls would be making certain improvements to the property. Between January 20 and March 31, the Devalls invested approximately $31,000 in the property. Stehlik sent a letter to the Devalls, dated March 29, 2005, notifying the Devalls of Jennifer's intention to exercise her right of first refusal.

Jennifer filed a complaint in the district court on April 7, 2005. Among other things, Jennifer alleged that the purchase offer made by the Devalls was never presented to her; that she never had an opportunity to respond to the Devall offer, contrary to the memorandum of understanding; and that the Devalls knew of the existence of Jennifer's right of first refusal but took no efforts to make their offer known to Jennifer. Jennifer alleged that the Devalls purchased the property subject to easements and restrictions of record and that her right of first refusal constituted a restriction of record. Jennifer stated that she had communicated to the Devalls her desire to purchase the property under the same terms and conditions as those of their offer to Wayne, but that the Devalls had refused to honor her right of first refusal. Jennifer asked the court to find that her right of first refusal constituted a restriction of record against the real estate. Jennifer sought an order directing the Devalls to convey title to Jennifer upon receipt of the consideration offered by the Devalls to Wayne and quieting title to the property in Jennifer. Jennifer also sought injunctive relief, which is not relevant to the issues on appeal.

In an amended answer, filed February 17, 2006, the Devalls alleged, among other things, that they were unaware of the memorandum of understanding and that they relied upon Stehlik's representation that Jennifer was not exercising the

right of first refusal contained in the farm lease. The Devalls also alleged that they had made improvements to the real property which had increased its value and for which they should be compensated through a lien on the property for the value of the improvements.

Jennifer filed a motion for summary judgment on February 17, 2006, which motion was heard by the district court on March 2. Evidence submitted at the hearing included the depositions of Meyer (the real estate broker who brokered the transaction), Stehlik (Jennifer's previous attorney), and Beverly Hess (the real estate broker who represented the Devalls), as well as certain deposition exhibits and affidavits of the parties. We will set forth the evidence admitted at the hearing as it relates to the question of whether the Devall offer was made known to Jennifer prior to closing and the question of improvements made on the property by the Devalls.

In an affidavit, Jennifer stated that she did not exercise her right of first refusal with respect to the Dalton offer and that during December 2004 and continuing through January 14, 2005, Wayne attempted to buy out Jennifer's lease interest in the property for a cash payment. No agreement was ever reached between Jennifer and Wayne concerning a buyout of the lease. Jennifer stated that she never discussed any need with Stehlik or authorized Stehlik to provide a letter to Wayne's real estate agent regarding her right of first refusal. When Jennifer received a copy of Stehlik's letter to Meyer on January 28, 2005, she called Stehlik to question why the letter had been prepared. Jennifer learned that the real estate had been sold to someone other than the Daltons sometime after February 1, and she averred that prior to that date, she had never been provided with either verbal or written notification regarding a proposed sale to someone other than the Daltons. Upon learning that the real estate had been sold, Jennifer made inquiries to find out the identity of the purchasers. Jennifer stated that she did not receive any communication from Wayne, the Devalls, or anyone on their behalf until the March 11 letter from the Devalls. Finally, Jennifer stated that on January 28, and through the date of her affidavit, February 15, 2006, she had the ability to exercise a right of first refusal to purchase the real estate in question

"upon the same terms and conditions" as those upon which the real estate was purchased by the Devalls.

Meyer testified by deposition. Meyer testified that Jennifer was told that the Dalton contract had fallen through, but he did not recall when she was told. Meyer testified that either he or Wayne let Jennifer know, but Meyer did not recall telling Jennifer himself. However, Meyer did not think that either he or Wayne gave Jennifer notice of the second offer, the offer from the Devalls. Meyer did not recall giving Stehlik a copy of the Devall offer. Meyer thought he called Stehlik and requested a letter, but he testified that he probably did not know whether Stehlik knew that an offer for $181,500 had been received. Meyer was unable to state whether Stehlik had been provided a copy of an addendum to the Devall purchase agreement, which addendum lowered the price to $160,000, prior to when Stehlik wrote the letter to Meyer regarding Jennifer's right of first refusal. Meyer testified, in fact, that the final purchase price between Wayne and the Devalls was not negotiated until Stehlik's letter had been received.

Upon cross-examination, Meyer testified that he gave notice of the Devall offer to Wayne but that he did not give notice of that offer to Jennifer. Meyer was asked specifically whether he knew if Wayne told Jennifer that there was another offer. Meyer responded that he doubted Wayne did so, because he did not think that Wayne and Jennifer were speaking. Meyer did not believe it necessary to notify Jennifer of the Devall offer, because of the letter from Stehlik. Meyer testified that when he called Stehlik, he asked whether every time there was an offer on the property, "we had to go back to [Jennifer] and get another right of refusal." When asked whether he had asked Stehlik to address any specific questions in the letter, Meyer responded, "I just asked Stehlik if we had to go back every time and if he'd give me a letter to that effect. And that's what I received." Meyer confirmed his earlier testimony that he did not think he told Stehlik that he was calling in reference to another offer on the property. Meyer testified that in their conversation, Stehlik did not tell him that Stehlik would have to check with Jennifer before sending the letter. Meyer represented to the

Devalls, at the time of closing, that Stehlik's letter "clear[ed] up the problem."

Stehlik also testified by deposition. Stehlik testified that Jennifer provided him with a copy of the Dalton offer to purchase the property for $185,000 and that Jennifer did not exercise her right of first refusal with respect to the Dalton purchase offer. Stehlik testified further that subsequently to the Dalton offer, he was not advised of any other purchase offers on the property. Stehlik specifically testified that he was not made aware that the Daltons had backed out of their offer to purchase the property. Concerning the telephone call he received from Meyer, Stehlik stated that Meyer wanted him to "generate a letter that said that Jennifer did not exercise her option or did not exercise the right of first refusal as set forth in the lease." Testifying that Meyer called on January 27, 2005, Stehlik stated, "He said he needed a letter indicating that Jennifer did not exercise her right of first refusal. That's all he said." Stehlik did not believe that Meyer discussed with him whether Jennifer had to be contacted every time an offer was received. Stehlik stated that neither Meyer nor Jennifer ever told him that there was another offer on the property. Stehlik testified that when Meyer called him, he assumed that the Dalton offer was the only offer in existence and that Jennifer did not have the financial resources to meet that offer. Stehlik generated his letter to Meyer based on this assumption. Stehlik testified that Meyer had expressed some urgency in his conversation about the letter and had indicated that he would pick the letter up from Stehlik. Stehlik did not recall whether he spoke to Jennifer before generating the letter, but he did testify that she called him after receiving a copy of the letter. Stehlik testified that he did not become aware of the Devall offer on the property until sometime in February 2005, after the closing date. Stehlik testified as to his understanding of Jennifer's right of first refusal, stating that he understood the documentation to require that "any subsequent offer needed to first be run by Jennifer." Stehlik thought that he called Meyer in approximately March, sometime after learning about the Devall offer, and that Meyer "kind of gave the impression that he didn't feel like he had to keep on going back to Jennifer."

Hess, the real estate broker who represented the Devalls, testified in her deposition that prior to the closing of the sale to the Devalls, no one communicated to her anything to indicate that Jennifer was not in agreement with waiving her right of first refusal. Hess stated that Meyer represented that the letter from Stehlik applied to the Devall transaction. Hess testified that Jennifer called her after the closing and told Hess that Jennifer had never given Stehlik permission to generate the letter to Meyer. Hess and the Devalls became aware prior to closing that Jennifer was a tenant on the property, but neither Hess nor the Devalls contacted Jennifer prior to closing. Hess testified that as soon as she found out about the right of first refusal, she asked Meyer to obtain something to indicate that Jennifer was signing off on the purchase. Hess agreed that the letter obtained was not signed by Jennifer, but she testified that she trusted that Jennifer's attorney, Stehlik, had signed the letter. Hess did not make a copy of the purchase agreement between the Devalls and Wayne or the addendum to that agreement available to Jennifer. Hess thought that information concerning the Devall offer for $181,500 had been made available to Jennifer, but she did not confirm that this was done.

An affidavit from Ronald Devall was received into evidence. Ronald stated that on January 28, 2005, prior to closing, he received a copy of the letter from Stehlik to Meyer indicating that Jennifer did not wish to exercise her right of first refusal with respect to the property. Ronald stated that Meyer represented to him that Stehlik's letter was in direct reference to the Devall offer to purchase the property. Ronald stated further that he was never given any indication or acknowledgment from anyone of Jennifer's not having been aware of the Devall offer to purchase the property and that the Devalls were assured by Wayne and Meyer that the Stehlik letter satisfied their concerns relative to the farm lease and the right of first refusal. With these assurances, Ronald assumed that Jennifer was aware of the circumstances of the Devalls' purchase of the property and felt no further need to communicate with Jennifer personally. Prior to closing, Ronald was advised that Jennifer was aware of the Dalton offer for $185,000, and he was advised by Wayne prior to closing that Jennifer did not have the financial resources

to meet the Dalton offer and would not have the financial resources to meet the $181,500 offer being submitted by the Devalls. Wayne also advised Ronald that once the Devalls purchased the property, the Devalls could develop the property as they wished without being in violation of the farm lease. Ronald stated that he purchased the property in order to construct some additional buildings and to run his trucking business from the property. Ronald detailed the improvements he made on the property between January 28, when he took possession of the property, and March 31, when he received the letter indicating that Jennifer wished to exercise her right of first refusal, and he stated that the improvements cost approximately $31,117.63. Ronald stated that the improvements had increased the value of the property in general and in particular had substantially increased the value of the residence on the property. Ronald stated that the improvements were made under the assumption that the Devalls were the lawful owners of the property.

The district court entered an order on April 5, 2006, granting Jennifer's motion for summary judgment. The court found that Jennifer possessed a valid right of first refusal on the property in question and that the Devalls closed on the transaction despite having actual and constructive notice of Jennifer's right. The court found that Wayne was required to notify Jennifer in writing of the offer and give her an opportunity to buy under the same terms, which, in this case, the court found to be the amount of $160,000. The court found that the Devalls were not good faith purchasers of the real estate. The court addressed the Devalls' contention that Jennifer was not entitled to summary judgment because she did not have the ability to complete the sale. The court noted Jennifer's affidavit, wherein Jennifer stated that on January 28, 2005, she did have the ability to purchase the property. The court found the statements in the record that Jennifer did not have the financial ability to complete a purchase under the terms of the Dalton agreement to be irrelevant to the question of whether she had the ability to make a purchase meeting the terms of the Devall offer. The court granted Jennifer's motion for summary judgment and ordered the Devalls to convey the premises to Jennifer upon receipt from her of $160,000. The court also stated that any

request for relief by any party not specifically granted by the court's order was denied. Subsequently, the Devalls perfected their appeal to this court.

ASSIGNMENTS OF ERROR

The Devalls assert, consolidated and restated, that the district court erred in (1) granting Jennifer's motion for summary judgment, (2) finding that Jennifer could acquire the property for $160,000, and (3) failing to consider and address the Devalls' claim that their improvements to the property unjustly enriched Jennifer.

STANDARD OF REVIEW

[1] An action for specific performance sounds in equity, and on appeal, an appellate court tries factual questions de novo on the record and, as to questions of both fact and law, is obligated to reach a conclusion independent from the conclusion reached by the trial court. *Langemeier v. Urwiler Oil & Fertilizer*, 265 Neb. 827, 660 N.W.2d 487 (2003).

[2,3] Summary judgment is proper when the pleadings and evidence admitted at the hearing disclose that there is no genuine issue as to any material fact or as to the ultimate inferences that may be drawn from those facts and that the moving party is entitled to judgment as a matter of law. *Johnson v. Knox Cty. Partnership*, 273 Neb. 123, 728 N.W.2d 101 (2007). In reviewing a summary judgment, an appellate court views the evidence in the light most favorable to the party against whom the judgment is granted and gives such party the benefit of all reasonable inferences deducible from the evidence. *Id.*

ANALYSIS

Jennifer's Right of First Refusal.

[4] A right of first refusal, rather than an option to purchase real estate, is created by an agreement which (1) contains no terms or conditions of sale; (2) fails to indicate that the party interested in purchasing real estate has an absolute right to demand conveyance of the property at any time prior to the owner's decision to sell it; and (3) implements the word "first" to indicate that if the owner decides to sell the real estate, he or she is compelled to offer it first to the other party to the

agreement. *Winberg v. Cimfel*, 248 Neb. 71, 532 N.W.2d 35 (1995). The parties do not question that what was created in the memorandum of understanding and the farm lease was a right of first refusal. The right created provides that if Wayne received an offer for purchase of his interest in the property which he wanted to accept, he was required to notify Jennifer in writing of the offer, after which notification Jennifer would have 30 days in which to exercise her right under the same terms and conditions as those of the offer. Although there is some dispute in the record as to whether Jennifer was aware prior to January 28, 2005, that the Daltons were no longer interested in purchasing the property, the record contains no evidence to suggest that Wayne presented either of the Devall offers to Jennifer, orally or in writing, at any time prior to January 28. There is no dispute in the record that the Devalls, Hess, and Meyer did not inform Jennifer of the Devall offer. Although Meyer requested a letter from Stehlik concerning Jennifer's exercise of her right, the record shows that Meyer did not inform Stehlik his request was in reference to the Devall offer and shows that Stehlik did not communicate with Jennifer prior to drafting and sending out the letter. While the Devalls may have relied on Stehlik's letter and the assurances of Meyer and Wayne in closing the transaction, without evidence that the Devall offer had been presented to Jennifer, Stehlik's letter did not act as an effective waiver of Jennifer's right relative to the Devall offer. The district court found no genuine issue of material fact concerning Jennifer's entitlement to be notified of the Devall offer and the lack of notice to her, and we find no error in this finding.

Devalls Were Not Good Faith Purchasers.

[5] The district court determined that the Devalls were not good faith purchasers of the real property. A good faith purchaser of land is one who purchases for valuable consideration without notice of any suspicious circumstances which would put a prudent person on inquiry. *Caruso v. Parkos*, 262 Neb. 961, 637 N.W.2d 351 (2002).

[6] The Nebraska Supreme Court has stated, "'The general rule is that a purchaser of real estate takes subject to outstanding equitable interests in the property, which are enforceable

against him to the same extent they are enforceable against the vendor, where the purchaser is not entitled to protection as a bona fide purchaser . . . .'" *Winberg v. Cimfel*, 248 Neb. at 80, 532 N.W.2d at 41, quoting *Westpark, Inc. v. Seaton Land Co.*, 225 Md. 433, 171 A.2d 736 (1961).

> Where the holder of an option exercises his or her rights thereunder and makes a purchase of real estate covered by the option, his or her act will relate back to the time of giving the option so as to cut off the rights of all persons who, with knowledge of the option, acquired subsequent interests in the land. Therefore, a holder of an option to purchase real property, given for a valuable consideration and duly accepted, may, under the prevailing rule, maintain a suit for specific performance against one purchasing the property with notice of the option.
>
> Specific performance will not, however, be decreed against third persons who become purchasers for value of property in ignorance of the option or contract. Furthermore, an option to purchase lands, unsupported by a valuable consideration, is not an interest therein which a purchaser for value is bound to notice or which equity will regard, and the want of mutuality may be urged as a bar to its specific enforcement.

71 Am. Jur. 2d *Specific Performance* § 188 at 200 (2001). See, also, *Beard v. Morgan*, 143 Neb. 503, 512, 10 N.W.2d 253, 258 (1943) ("'[a] purchaser with notice is liable to the same equity, stands in his place, and is bound to do that which the person he represents would be bound to do by the decree. He takes the estate subject to the charge, and stands in the place of his vendor'").

[7,8] The burden of proof is upon a litigant who alleges that he or she is a good faith purchaser to prove that he or she purchased the property for value and without notice; this burden includes proving that the litigant was without notice, actual or constructive, of another's rights or interest in the land. *Caruso v. Parkos, supra*. To qualify as a bona fide purchaser of land, one must actually have paid the purchase money before he or she received notice of a claim against the land. *Winberg v. Cimfel*, 248 Neb. 71, 532 N.W.2d 35 (1995). It is uncontradicted that

the Devalls became aware of Jennifer's right of first refusal prior to the January 28, 2005, closing date. Accordingly, the Devalls were not good faith purchasers and were bound by Jennifer's right of first refusal. See *id.*

Jennifer's Exercise of Right of First Refusal.

The Devalls argue that there are issues of material fact concerning the terms under which Jennifer could exercise her right. We disagree. The record is clear that Wayne initially accepted the Devall offer to purchase the property for $181,500, but that when he was unable to buy out the farm lease held by Jennifer, he agreed to give the Devalls a credit of $21,500 at the time of closing in return for accepting the terms of the existing farm lease. In other words, in exchange for not having to buy out the farm lease, Wayne agreed to accept a purchase price in terms of actual dollars received of $160,000. The district court found that the terms of the Devall offer were for a purchase price of $160,000 and that Jennifer should be given the opportunity to purchase the property under those terms. The right of first refusal given to Jennifer specifies that she be given the right to purchase Wayne's interest in the property under the same terms and conditions as those of any offer accepted by Wayne for the sale of his interest in the property. Even if Jennifer had been notified of the $181,500 offer and had chosen not to exercise her option relative to that offer, she still was entitled to notice of the $160,000 offer and had the right to exercise her option relative to that offer as well. We find no error in the district court's findings as to the terms under which Jennifer could exercise her right of first refusal.

[9-11] The Devalls present certain arguments as to whether there are issues of material fact concerning Jennifer's financial ability to perform under the right of first refusal. A party seeking specific performance must show his or her right to the relief sought, including proof that the party is ready, able, and willing to perform his or her obligations under the contract. *Langemeier v. Urwiler Oil & Fertilizer*, 265 Neb. 827, 660 N.W.2d 487 (2003). In her affidavit, Jennifer stated that on January 28, 2005, and through the date of her affidavit, she had the ability to exercise her right of first refusal under the

terms and conditions of the Devall offer. A party moving for summary judgment must make a prima facie case by producing enough evidence to demonstrate that the movant is entitled to judgment if the evidence were uncontroverted at trial. *Pogge v. American Fam. Mut. Ins. Co.*, 272 Neb. 554, 723 N.W.2d 334 (2006). Once the moving party makes a prima facie case, the burden to produce evidence showing the existence of a material issue of fact that prevents judgment as a matter of law shifts to the party opposing the motion. *Id.* The Devalls presented no direct evidence to contradict the assertion in Jennifer's affidavit, only pointing to evidence that Jennifer was unable to meet the financial requisites of the Dalton offer. We agree with the district court's conclusion that Jennifer's financial inability to purchase the property at the time of the Dalton offer under the terms of the Dalton offer is irrelevant to the question of whether in January 2005 she was financially able to complete a purchase under the terms of the Devall offer.

Viewing the evidence in the light most favorable to the Devalls and giving them the benefit of all reasonable inferences deducible from the evidence, as we must, we conclude that the district court did not err in granting summary judgment in Jennifer's favor.

Improvements Made by Devalls.

The Devalls assert that the district court erred in failing to consider and address their claim that their improvements to the property unjustly enriched Jennifer. Although the court's summary judgment order did not specifically address this claim by the Devalls, the court indicated that it was denying any request for relief not specifically granted by its order.

[12,13] As a general rule, in order that one may recover compensation for improvements made on another's land, as equitable relief, three concurrent elements must be shown to exist: (1) The occupant must have made the improvements in good faith; (2) he must have been in possession, actual or constructive, adversely to the title of the true owner; and (3) his possession must have been held under color or claim of title. *Williams v. Beckmark*, 150 Neb. 100, 33 N.W.2d 352 (1948). An occupant of land is not a possessor in good faith and hence is not entitled

to compensation for improvements which he makes thereon after he has notice or knowledge that his title is defective, or notice or knowledge of an adverse title or claim to the property in another. See *id.* See, also, Neb. Rev. Stat. § 76-301 et seq. (Reissue 2003) (enacted with respect to occupying claimants).

Because the Devalls made the improvements with knowledge of the lease and right of first refusal, they were not entitled to recover on their claim. We find no error in the denial of the Devalls' claim for compensation for improvements made to the property.

CONCLUSION

The district court did not err in granting summary judgment in Jennifer's favor or in denying the Devalls' claim with respect to improvements made to the property.

AFFIRMED.

KELLI D. HOLLING, APPELLEE, V.
TONY L. HOLLING, APPELLANT.
744 N.W.2d 479

Filed February 5, 2008. No. A-07-065.

1. **Statutes: Appeal and Error.** Statutory interpretation is a matter of law, in connection with which an appellate court has an obligation to reach an independent, correct conclusion irrespective of the determination made by the court below.
2. **Courts: Trial: Evidence: Dismissal and Nonsuit.** After submission, a trial court has no authority to dismiss a case without prejudice on the basis that a plaintiff has failed to produce sufficient evidence to sustain his or her claims.

Appeal from the District Court for Dawson County: JAMES E. DOYLE IV, Judge. Affirmed as modified.

Douglas Pauley and Chris A. Johnson, of Conway, Pauley & Johnson, P.C., for appellant.

No appearance for appellee.

INBODY, Chief Judge, and CARLSON and CASSEL, Judges.

CASSEL, Judge.

INTRODUCTION

Kelli D. Holling, on behalf of her minor children, sought a protection order against Tony L. Holling. After an evidentiary hearing, the district court for Dawson County dismissed Kelli's petition "without prejudice." Tony appeals. Because the matter was submitted to the district court on the merits, the court lacked authority to dismiss without prejudice. We modify the judgment to dismiss the petition with prejudice.

STATEMENT OF FACTS

In November 2006, Kelli, on behalf of her two minor children, filed a petition to obtain a domestic abuse protection order. It would serve no useful purpose here to describe Kelli's allegations. Instead, it is relevant to note only that, following a hearing in which Kelli represented herself and both parties adduced evidence, the district court found that Kelli had failed to establish that she was entitled to have a protection order issued. The court stated, "I'm going to dismiss your petition without prejudice, which means if you need to bring it up again, you can, but you're going to have to have different proof than you did today." Upon Tony's objection, the court stated that when it dismissed without prejudice, it meant that costs would not be assessed against anyone. The court reiterated that Kelli would have the right to bring up additional facts that had not been presented at the hearing that day.

Tony has appealed from this order. Pursuant to this court's authority under Neb. Ct. R. of Prac. 11B(1) (rev. 2006), the case was ordered submitted without oral argument.

ASSIGNMENT OF ERROR

Tony assigns one error, asserting that the district court failed to dismiss Kelli's action with prejudice.

STANDARD OF REVIEW

[1] Statutory interpretation is a matter of law, in connection with which an appellate court has an obligation to reach an independent, correct conclusion irrespective of the determination made by the court below. *Watson v. Watson*, 272 Neb. 647, 724 N.W.2d 24 (2006).

ANALYSIS

As summarized, Tony argues that he has already been subjected to trial on Kelli's request for a protection order and that she failed to prove her allegations. He complains that when the district court dismissed the case without prejudice after a trial on the merits, it effectively handed Kelli a second chance to pursue the identical claims against him.

Neb. Rev. Stat. § 25-601 (Reissue 1995) governs dismissals without prejudice. It provides as follows:

> An action may be dismissed without prejudice to a future action (1) by the plaintiff, before the final submission of the case to the jury, or to the court where the trial is by the court; (2) by the court where the plaintiff fails to appear at the trial; (3) by the court for want of necessary parties; (4) by the court on the application of some of the defendants where there are others whom the plaintiff fails to diligently prosecute; (5) by the court for disobedience by the plaintiff of an order concerning the proceedings in the action. In all other cases on the trial of the action the decision must be upon the merits.

Section 25-601 thus enumerates the circumstances in which a trial court may order a dismissal without prejudice, none of which encompasses the situation presented in this case. In the absence of any of these circumstances, a trial court is clearly directed to make its decision upon the merits.

As the Nebraska Supreme Court explained many years ago:

> At common law a nonsuit was not a bar to a future action, and the evident purpose of the framers of the code was to change the law in order to lead every case to a final judgment which should be a bar except where, for sufficient reasons, other provision has been made.

Zittle v. Schlesinger, 46 Neb. 844, 846-47, 65 N.W. 892 (1896). The goal of the statute has not changed in the intervening years.

In a similar case, the Supreme Court of Minnesota stated, "[T]he rules do not provide for the trial court, on its own, to dismiss a case without prejudice because a claimant is in trouble on the merits of her case." *Lampert Lumber Co. v. Joyce*, 405 N.W.2d 423, 426 (Minn. 1987). "[O]nce the case is finally

submitted, if the integrity of the adversarial trial process is to be maintained, we think the trial judge is under a duty to decide the matter on the merits." *Id.*

[2] Section 25-601 is unambiguous in its terms. After submission, a trial court has no authority to dismiss a case without prejudice on the basis that a plaintiff has failed to produce sufficient evidence to sustain his or her claims. The district court erred in doing so in the instant case.

CONCLUSION

We modify the judgment of the district court to dismiss Kelli's petition with prejudice, and as so modified, we affirm.

AFFIRMED AS MODIFIED.

STATE OF NEBRASKA, APPELLANT, V.
GREGORY D. HATT, APPELLEE.

744 N.W.2d 493

Filed February 5, 2008. No. A-07-190.

1. **Sentences: Appeal and Error.** Whether an appellate court is reviewing a sentence for its leniency or its excessiveness, a sentence imposed by a district court that is within the statutorily prescribed limits will not be disturbed on appeal unless there appears to be an abuse of the trial court's discretion.
2. **Judges: Words and Phrases.** A judicial abuse of discretion exists only when the reasons or rulings of a trial judge are clearly untenable, unfairly depriving a litigant of a substantial right and denying a just result in matters submitted for disposition.
3. **Sentences: Appeal and Error.** Neb. Rev. Stat. § 29-2322 (Reissue 1995) provides that an appellate court, upon a review of the record, shall determine whether a sentence imposed is excessively lenient, having regard for (1) the nature and circumstances of the offense; (2) the history and characteristics of the defendant; (3) the need for the sentence imposed (a) to afford adequate deterrence to criminal conduct; (b) to protect the public from further crimes of the defendant; (c) to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense; and (d) to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner; and (4) any other matters appearing in the record which the appellate court deems pertinent.
4. **Sentences.** A sentencing court is not limited in its discretion to any mathematically applied set of factors. The appropriateness of a sentence is necessarily a subjective judgment and includes the sentencing judge's observation of the defendant's

> demeanor and attitude and all the facts and circumstances surrounding the defendant's life. But there also must be some reasonable factual basis for imposing a particular sentence.

Appeal from the District Court for Douglas County: MARLON A. POLK, Judge. Sentence vacated, and cause remanded for resentencing.

Donald W. Kleine, Douglas County Attorney, and James M. Masteller for appellant.

Christopher J. Lathrop for appellee.

INBODY, Chief Judge, and IRWIN and MOORE, Judges.

MOORE, Judge.

INTRODUCTION

The State of Nebraska, through the Douglas County Attorney, appeals from the sentence imposed upon Gregory D. Hatt for his conviction of driving under the influence of alcohol (DUI), fourth offense. The State asserts that the sentence imposed—a 2-year period of intensive supervision probation (ISP) under specified terms and conditions—was excessively lenient. For the reasons recited below, we conclude that the sentence is excessively lenient, vacate the sentence, and remand the cause with instructions for a different judge to impose a greater sentence.

BACKGROUND

In an amended information filed on November 13, 2006, Hatt was charged with DUI, fourth offense, a Class IV felony; assault on an officer in the second degree, a Class III felony; operating a motor vehicle during a period of revocation, a Class II misdemeanor; and leaving the scene of a personal injury accident, a Class I misdemeanor. A jury trial was held, after which the jury found Hatt guilty of all charges, except the assault charge.

We do not have the bill of exceptions from the trial; however, our record contains a presentence investigation report (PSI) which contains certain information about the events leading up to Hatt's arrest. At this point, we note that the PSI in our record, dated February 5, 2007, is an update to the PSI

completed on November 4, 2005, in connection with Hatt's last DUI conviction. The State in its brief cites to information apparently contained in the previous PSI, which is not in our record. Our review is limited to the PSI update contained in the record presented to us in this appeal.

The PSI indicates that the charges in this case stem from an occurrence in the early morning hours of February 10, 2006. While on routine patrol in Omaha, a police officer's vehicle was struck by a vehicle driven by Hatt, who immediately fled from the scene on foot. Hatt was apprehended shortly after the collision and was subjected to field sobriety tests and a breath test, which resulted in a reading of .200 of a gram of alcohol per 210 liters of his breath. Hatt admitted that he had been drinking beer for several hours during the evening preceding the accident. A check of Hatt's record at the time of arrest revealed that his driver's license was suspended as of November 4, 2005, for a DUI conviction and also revealed four additional DUI convictions.

The police officer whose vehicle was struck sustained serious injuries as a result of the accident, resulting in fusion surgery in his spine which has caused him pain and has limited his activities and ability to work.

A sentencing hearing was held on February 9, 2007. At the hearing, Hatt's attorney stated that Hatt had successfully completed an outpatient treatment program for his alcohol and mental health issues and that Hatt's counselor had indicated that Hatt could be successfully discharged from the program. Hatt's attorney also stated that Hatt was attending Alcoholics Anonymous (AA) meetings and had a sponsor, and indicated that the court had a letter from the sponsor, though this letter does not appear in our record. Hatt's attorney requested that Hatt receive probation, while the victim and the State requested a term of incarceration and a 15-year license revocation.

Before sentencing Hatt, the district court stated the following to him:

> [I]n trying to determine your sentence, the Court has reviewed the [PSI] that was prepared as well as the letters received from your counselors. And as you know, we had a multiple day jury trial in this matter, so the Court is very

familiar with the factual circumstances as to what took place on the day in question.

And as I've said many times, dealing with drunk drivers is the most difficult thing for me to do because there is no certainty as to what the answer should be, and I think that that uncertainty is reflected in the law because this appears to be one of the few crimes where you are given so many different options, which tells you how complicated this area is.

And on the one hand, the probation department is recommending that you go straight to prison, and in one sense that would answer the question and provide some certainty, at least in the short-term, because we could simply just lock you up and not have to worry about you violating any more Court orders or you driving drunk. And as your lawyer pointed out, that has to be balanced with what is best for you, because under Nebraska law the Court is not only to consider numerous factors in determining what the appropriate sentence should be, but the sentence must also — not only fit the crime, but must also fit you as well. And that again is one of the reasons that it makes it so difficult, because a clear argument could be made that the counseling and all of that was undertaken clearly just because you were involved in the court process, because there always seems to be gaps in the counseling. There never seems to be gaps when there is a court proceeding coming on or there never seems to be counseling when there is not a court proceeding on the horizon.

And with your history of alcohol use it should not take 20 years, it should not take this sentencing day for you to understand what your issues are, and that responsibility all falls on you. And that further has to be balanced with the society that we have created with the prevalence and the acceptance and the promotion and all the uses for alcohol that everyone seems to celebrate until something goes wrong, and that is another balance as well.

And it's not really my position to do what I think is popular, but I am, at least in my judgment, trying to do

> what is best for all of those involved. Because the one thing we cannot guarantee is no matter how long we put you in prison, we could not guarantee that you do not drink again. We cannot guarantee that you do not drive again even if we take your driver's license as has been done in the past, and none of those guarantees are unfortunately available to us.
>
> The Court does note that there is a victim in this case, and multiple victims, society as well as [the injured officer]. And the Court does recognize what he went through having sat through this trial.

The district court then sentenced Hatt to 2 years' ISP with several specified terms and conditions. Hatt was ordered to be on electronic monitoring for the first 120 days; use a "SCHRAMM" device, which would monitor him for alcohol use; and have a curfew for the first year of probation, by which he was ordered to be in his place of residence by 10 p.m. on Friday, Saturday, and Sunday nights. Hatt was fined $1,000, and his driver's license was revoked for a period of 1 year. Hatt was also ordered to serve 10 days in the Douglas County Correctional Center, with credit for 1 day served. Hatt's vehicle was immobilized for 6 months. The written order of ISP also states that Hatt shall "[c]ontinue in any treatment programs that have been recommended including attend AA meetings."

For Hatt's other two convictions, operating a motor vehicle during a period of revocation and leaving the scene of a personal injury accident, Hatt was sentenced to 2 years' ISP, to be served concurrently. Hatt was also convicted of a probation violation under a separate docket, the sentencing for which occurred at the same time as sentencing for the instant offenses. Hatt was sentenced on the probation violation to the Douglas County Correctional Center for 90 days, with credit for serving 22 days, and his driver's license was revoked for 15 years.

We note that the district court's trial docket entry for February 9, 2007, reads in part as follows: "Sentencing hearing. [Hatt] appeared in Court with counsel . . . . The Court having fully considered the age of the accused, [his] former course of life, disposition, habits and inclinations, is of the opinion that the

accused will refrain from engaging in or committing further criminal acts in the future."

The State now timely appeals.

ASSIGNMENT OF ERROR

The State asserts that the district court abused its discretion by imposing an excessively lenient sentence upon Hatt for the DUI conviction.

STANDARD OF REVIEW

[1,2] Whether an appellate court is reviewing a sentence for its leniency or its excessiveness, a sentence imposed by a district court that is within the statutorily prescribed limits will not be disturbed on appeal unless there appears to be an abuse of the trial court's discretion. *State v. Thompson*, 15 Neb. App. 764, 735 N.W.2d 818 (2007); *State v. Rice*, 269 Neb. 717, 695 N.W.2d 418 (2005). A judicial abuse of discretion exists only when the reasons or rulings of a trial judge are clearly untenable, unfairly depriving a litigant of a substantial right and denying a just result in matters submitted for disposition. *Id*.

ANALYSIS

The State asserts that the district court abused its discretion and imposed an excessively lenient sentence upon Hatt. Hatt was convicted of DUI, fourth offense, a Class IV felony punishable by up to 5 years' imprisonment, a $10,000 fine, or both. See Neb. Rev. Stat. §§ 60-6,196 (Reissue 2004) and 28-105 (Cum. Supp. 2006).

[3,4] Neb. Rev. Stat. § 29-2322 (Reissue 1995) provides that an appellate court, upon a review of the record, shall determine whether a sentence imposed is excessively lenient, having regard for (1) the nature and circumstances of the offense; (2) the history and characteristics of the defendant; (3) the need for the sentence imposed (a) to afford adequate deterrence to criminal conduct; (b) to protect the public from further crimes of the defendant; (c) to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense; and (d) to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner; and (4) any

other matters appearing in the record which the appellate court deems pertinent. *State v. Thompson, supra*. A sentencing court is not limited in its discretion to any mathematically applied set of factors. The appropriateness of a sentence is necessarily a subjective judgment and includes the sentencing judge's observation of the defendant's demeanor and attitude and all the facts and circumstances surrounding the defendant's life. But there also must be some reasonable factual basis for imposing a particular sentence. *State v. Rice, supra*.

Hatt has a history of alcohol-related offenses, with the present offense being his sixth DUI conviction. Hatt was on probation for a DUI conviction at the time of the current offense. Hatt's first DUI arrest occurred on June 13, 1994, for which he received 15 months' probation. Hatt was satisfactorily discharged from this probation sentence. Hatt was next arrested for DUI, first offense, on September 18, 1996, and was sentenced to 1 year of probation, a $500 fine, and a 60-day license impoundment. This probation was revoked on February 5, 1998, and Hatt was sentenced to 60 days in jail. On June 17, 1998, Hatt was arrested a third time for DUI, which offense was amended to a second-offense DUI. Hatt was sentenced to 75 days in jail, a $500 fine, and a 1-year license revocation. Hatt was arrested a fourth time for DUI on September 7, 1999, and this offense was amended to a third-offense DUI. Hatt was sentenced to 2 years' ISP, a $600 fine, and a 1-year license revocation. Hatt was released from this probation at a later point. On May 5, 2004, Hatt was arrested for his fifth DUI, which was amended to a third-offense DUI. Hatt was sentenced to 2 years' probation, 10 days in jail, a $600 fine, and a 1-year license revocation. It was this probation sentence that Hatt violated when he committed the present offense. Hatt's record also shows two convictions for driving under suspension. Hatt was sentenced to 12 months' probation and 2 days in jail for the first conviction, and was unsatisfactorily discharged from probation. He was sentenced for the second driving under suspension conviction to 10 days in jail and a 1-year license revocation.

Hatt was 50 years old at the time of the present offense and was divorced with two children. Hatt graduated from high school and attended 1 year of college but did not earn a

degree. Hatt had been employed as a sales associate and customer service representative at Wal-Mart since April 2004. Hatt described his physical health as "'good'" and his mental health as "'improving every day.'" Hatt reported that he suffers from depression, for which he takes medication and sees a counselor one to two times a month.

Hatt reported during the PSI interview, conducted on December 18, 2006, that he had been sober since his May 5, 2004, DUI charge until the current offense in February 2006, and Hatt stated that he had not consumed alcohol since the February incident. Hatt stated that on the day prior to the incident, he had been "doing a lot of errands to get caught up on his day off from work" and that he "'was wearing down.'" He began drinking beer around 4 p.m. at a La Vista keno establishment and then he left and bought gas and a six-pack of beer. He stated, "'I drove around. I think and I'm not really sure what happened or how much I drank. My weight was down. Unusually low for me.'" Hatt's "Defendant's Statement" in the PSI reads as follows:

> Things had been building up inside during the holidays 2005 & stress combined with pressures became overwhelming which led to a brief meltdown in Feb. 2006 - there were other factors involving medication that have been corrected since this problem surfaced & with adjustments & therapy, I have improved dramatically. Hope to continue on this forward direction & feel much better with things in my life.

Hatt reported that he was attending at least one AA meeting a week and that "'[m]ost of [his] contacts are with people from AA.'" Hatt stated that he completed outpatient treatment in 1998 and 2000 for two DUI convictions. The PSI refers to a letter from Hatt's counselor in his probation file which stated that Hatt began treatment in July 2004 for alcohol dependency and depression and was ready to be discharged when he relapsed and received the current DUI offense. The counselor stated in the letter that the last time he met with Hatt was on August 17, 2006, and that Hatt had canceled several sessions.

Hatt was administered the "Driver Risk Inventory," and the testing results appear in the PSI. On the "Truthfulness" scale,

Hatt scored a "Low Risk 14%," indicating that he was "non-defensive, cooperative and truthful," and it was noted that this was "an accurate SAQ profile." For the "Alcohol" scale, Hatt scored a "Maximum Risk 96%," indicating that "[a]lcohol use may be out of control or represent a 'recovering alcoholic' relapse. This person presents a serious problem with alcohol and the arrest presents additional corroboration. Relapse risk is very high." On the "Driver Risk" scale, Hatt scored a "Maximum Risk 90%," with the comment, "Many indicators of driver risk are indicated. This person presents as an aggressive and irresponsible driver. A driver safety program could be beneficial." For the "Stress Coping" scale, Hatt scored a "Problem Risk 73%," indicating that "[h]igh levels of experienced stress and/or below average stress coping abilities are indicated. This offender could benefit from completion of a stress management program."

A "Simple Screening Instrument" was also administered to Hatt, and he scored a risk level of 5 out of 14, indicating a "moderate to high risk for substance abuse and a possible need for further assessment." The probation officer who completed the PSI stated that Hatt's scoring on the ISP screening tool indicated that Hatt could be considered for the Work Ethic Camp program, followed by ISP. However, the probation officer recommended instead a term of incarceration and a 15-year driver's license revocation. The probation officer stated that "Hatt is not an appropriate candidate for Probation anymore. He has been given plenty of opportunities to change his behavior and has failed to do so. A term of incarceration and a 15 year driver's license revocation is recommended to promote accountability for this offense."

We find that given Hatt's repeated pattern of alcohol-related offenses, the sentence imposed by the district court does not adequately reflect the seriousness of the offense, promote respect for the law, or provide just punishment. Moreover, Hatt's conduct posed an obvious and real threat to public safety. Hatt has not been deterred from drinking and driving in the past by either probation or license suspension. There is nothing in the record to suggest that such measures are likely to succeed now. Hatt has continued to relapse into alcohol abuse and to

drink and drive, despite having obtained treatment on a number of occasions, having been fined and placed on probation, and having had his license suspended. We conclude that the sentence imposed by the district court is excessively lenient.

CONCLUSION

We determine that the district court imposed an excessively lenient sentence upon Hatt. Under Neb. Rev. Stat. § 29-2323 (Reissue 1995), when an appellate court determines that a sentence imposed is excessively lenient, it shall either (1) remand the cause for imposition of a greater sentence, (2) remand the cause for further sentencing proceedings, or (3) impose a greater sentence. Under § 29-2323(1)(a), we vacate the sentence and remand the cause to the district court with instructions to impose a greater sentence. The sentence should be imposed by a different district court judge than the original sentencing judge.

SENTENCE VACATED, AND CAUSE REMANDED FOR RESENTENCING.

STATE OF NEBRASKA, APPELLEE, V. RONNIE VASQUEZ, ALSO KNOWN AS RONALD VASQUEZ, APPELLANT.

744 N.W.2d 500

Filed February 12, 2008. No. A-07-028.

1. **Judgments: Speedy Trial: Appeal and Error.** As a general rule, a trial court's determination as to whether charges should be dismissed on speedy trial grounds is a factual question which will be affirmed on appeal unless clearly erroneous.
2. **Judgments: Statutes: Appeal and Error.** To the extent an appeal calls for statutory interpretation or presents questions of law, an appellate court must reach an independent conclusion irrespective of the determination made by the court below.
3. **Speedy Trial.** Neb. Rev. Stat. § 29-1207 (Reissue 1995) requires that a defendant be tried within 6 months after the filing of the information, unless the 6 months are extended by any period to be excluded in computing the time for trial.
4. ____. To calculate the time for speedy trial purposes, a court must exclude the day the information was filed, count forward 6 months, back up 1 day, and then add any time excluded under Neb. Rev. Stat. § 29-1207(4) (Reissue 1995) to determine the last day the defendant can be tried.

5. **Speedy Trial: Proof.** The burden of proof is upon the State that one or more of the excluded time periods under Neb. Rev. Stat. § 29-1207(4) (Reissue 1995) is applicable when the defendant is not tried within 6 months.
6. ____: ____. To overcome a defendant's motion for discharge on speedy trial grounds, the State must prove the existence of an excludable period by a preponderance of the evidence.
7. **Speedy Trial: Pretrial Procedure: Motions to Suppress.** Neb. Rev. Stat. § 29-1207(4)(a) (Reissue 1995) excludes from speedy trial calculations the time from filing until final disposition of pretrial motions by the defendant, including motions to suppress.
8. **Speedy Trial: Pretrial Procedure.** Where a motion to discharge on speedy trial grounds is submitted to a trial court, the excludable period attributable to a defendant's pretrial motion is calculated from the date the motion is filed until the date the motion is granted or denied.
9. **Speedy Trial: Words and Phrases.** A "proceeding," as used in the speedy trial statute provision governing delay resulting from proceedings concerning the defendant, is, in a more particular sense, any application to a court of justice, however made, for aid in the enforcement of rights, for relief, for redress of injuries, for damages, or for any remedial object.
10. ____: ____. The term "proceeding," as used within Neb. Rev. Stat. § 29-1207(4)(a) (Reissue 1995), must be read narrowly.
11. **Speedy Trial: Good Cause.** Under Neb. Rev. Stat. § 29-1207(4)(f) (Reissue 1995), time may be excluded for a period of delay where good cause is shown.
12. ____: ____. Under a plain reading of Neb. Rev. Stat. § 29-1207(4)(f) (Reissue 1995), before an evaluation for good cause need be made, there must first be a "period of delay."
13. ____: ____. If a trial court relies on Neb. Rev. Stat. § 29-1207(4)(f) (Reissue 1995) in excluding a period of delay from the 6-month computation, a general finding of good cause will not suffice and the trial court must make specific findings as to the good cause or causes which resulted in the extensions of time.
14. **Appeal and Error.** When a trial court's findings are incomplete, an appellate court must remand the cause for further consideration.
15. ____. An appellate court is not obligated to engage in an analysis that is not needed to adjudicate the controversy before it.

Appeal from the District Court for Buffalo County: JOHN P. ICENOGLE, Judge. Reversed and remanded with directions.

Stephen G. Lowe for appellant.

Jon Bruning, Attorney General, and Kimberly A. Klein for appellee.

INBODY, Chief Judge, and CARLSON and CASSEL, Judges.

CASSEL, Judge.

INTRODUCTION

Ronnie Vasquez, also known as Ronald Vasquez, appeals from an order overruling his motion for discharge, based upon his statutory right to a trial within 6 months and his federal and state constitutional rights to a speedy trial. The ultimate question is whether any periods of time are excludable because Vasquez failed to fulfill a plea bargain. Because the district court failed to make sufficient findings, we reverse, and remand with directions.

BACKGROUND

The State charged Vasquez with possession of a controlled substance with intent to deliver. The information was filed on August 16, 2006. Subsequently, Vasquez entered a plea of not guilty. On November 28, Vasquez filed a motion for absolute discharge, premised both on Neb. Rev. Stat. §§ 29-1207 and 29-1208 (Reissue 1995) and on his state and federal constitutional rights to a speedy trial.

On November 30, 2006, the district court conducted a hearing on the motion for absolute discharge. The evidence consisted solely of exhibits, primarily the district court case files of the instant case and an earlier prosecution. The court took the motion under advisement. At the conclusion of the hearing, Vasquez, who was then scheduled for jury trial on the following Monday, elected to waive his right to trial by jury.

On December 4, 2006, the matter proceeded to a bench trial. Before commencing the trial, the court announced its decision overruling the speedy trial motion and pronounced specific findings, which we now summarize. At the time of Vasquez' arrest, he was informed that the State intended to charge him with possession of a controlled substance with intent to distribute. The State offered to reduce the charge to simple possession and to recommend Vasquez for rehabilitative programs in exchange for Vasquez' providing information concerning other investigations. Vasquez agreed. The State filed the first case, district court case No. CR05-152, in compliance with the agreement. The State complied with its portion of the agreement, as did Vasquez, until he was arraigned on February 10, 2006. At that

time, however, Vasquez entered a plea of not guilty. The charge in case No. CR05-152 was dismissed on May 26. The case now being appealed, district court case No. CR06-91, was then filed, as noted above, on August 16. The district court found that the time periods involved in the two cases must be considered together for purposes of speedy trial. The court stated, "Based upon the plea agreement and the change of heart, at the time the motion for discharge was filed, more than 187 days have elapsed." The court found that the period of time from the withdrawal from the agreement by Vasquez until the time the new information was filed was excludable. The court also excluded the period of time that elapsed between the making of the agreement and the withdrawal from the agreement.

We return to the proceedings on December 4, 2006. After the court announced its decision on the motion for discharge, Vasquez' counsel elected to "stand basically on the motion for discharge" and informed the court that Vasquez would enter into a stipulation that would acknowledge or admit facts sufficient to constitute a conviction "[a]nd then we'll proceed with the appeal . . . ." Vasquez' counsel requested a continuance to enable Vasquez to file an appeal, which motion the court overruled, finding that "the ruling on the application for discharge is not a final order."

The prosecutor then proposed a factual stipulation and offered exhibits. Vasquez made no objection to the exhibits, which were received, and accepted the prosecutor's stipulation. The court noted that throughout the proceedings, the State had agreed that Vasquez was preserving his right to challenge the court's ruling on the motion for discharge. Based upon the stipulated evidence, the court found Vasquez guilty and scheduled the matter for sentencing on January 5, 2007. The court also ordered a presentence investigation.

On January 3, 2007, Vasquez filed his first notice of appeal, which was docketed in this court as the instant case.

Despite the pendency of the instant appeal, the district court conducted further proceedings, ultimately leading to the imposition of a sentence on January 25, 2007. Vasquez filed a second notice of appeal, and we have previously, by memorandum opinion, disposed of the second appeal. See *State v. Vasquez,*

ante p. xxi (No. A-07-184, Oct. 11, 2007). We determined that the district court lacked jurisdiction to proceed with sentencing and that its judgment was void. Accordingly, we vacated the void judgment but also determined that because of the pendency of the instant appeal, it was not yet appropriate to remand the cause to the district court for resentencing.

ASSIGNMENTS OF ERROR

Vasquez assigns four errors, the first three of which, restated, assert that the district court erred in excluding certain time periods from the statutory speedy trial calculations, in failing to sustain his motion for absolute discharge, and in denying his state and federal constitutional rights to a speedy trial.

While Vasquez also assigns that the court erred in receiving into evidence a videotape of the police interviews, he did not argue this matter in his brief, and we decline to address it further. To be considered by an appellate court, an alleged error must be both specifically assigned and specifically argued in a party's brief. *State v. McKinney*, 273 Neb. 346, 730 N.W.2d 74 (2007).

STANDARD OF REVIEW

[1] As a general rule, a trial court's determination as to whether charges should be dismissed on speedy trial grounds is a factual question which will be affirmed on appeal unless clearly erroneous. *State v. Sommer*, 273 Neb. 587, 731 N.W.2d 566 (2007).

[2] To the extent an appeal calls for statutory interpretation or presents questions of law, an appellate court must reach an independent conclusion irrespective of the determination made by the court below. *State v. Rieger*, 270 Neb. 904, 708 N.W.2d 630 (2006).

ANALYSIS

Statutory Speedy Trial Calculations Before Exclusions.

Vasquez asserts that the district court erred in overruling his motion to discharge, because the court erred in excluding certain time periods. Before reaching his specific arguments, we perform the initial calculations in light of the Nebraska statutory speedy trial jurisprudence.

[3,4] Section 29-1207 requires that a defendant be tried within 6 months after the filing of the information, unless the 6 months are extended by any period to be excluded in computing the time for trial. *State v. Sommer, supra*. If a defendant is not brought to trial before the running of the time for trial, as extended by excluded periods, he or she shall be entitled to an absolute discharge from the offense charged. *Id*. To calculate the time for speedy trial purposes, a court must exclude the day the information was filed, count forward 6 months, back up 1 day, and then add any time excluded under § 29-1207(4) to determine the last day the defendant can be tried. *State v. Sommer, supra*.

The district court found, and neither party disputes, that the periods during which the two informations were pending must be combined in determining the last day for commencement of trial under the speedy trial act. See, *State v. French*, 262 Neb. 664, 633 N.W.2d 908 (2001); *State v. Trammell*, 240 Neb. 724, 484 N.W.2d 263 (1992); *State v. Sumstine*, 239 Neb. 707, 478 N.W.2d 240 (1991). In *State v. Sumstine, supra*, the Nebraska Supreme Court explained the rationale of tacking and the tolling approach—to prevent the State from undermining or subverting implementation of the speedy trial act. Under this approach, the calculation begins with the filing of the first information. During the period between dismissal of the first information and filing of the second information, the speedy trial time is tolled. The time resumes upon filing of the second information, including the day of its filing. See *id*.

The first information against Vasquez was filed on December 23, 2005. For the moment disregarding time periods excludable under § 29-1207(4) and the tolling during dismissal, the last day the State could have brought Vasquez to trial would have been June 23, 2006.

The time chargeable to the State ceases, or is tolled, during the interval between the State's dismissal of the initial information and the filing of the second information. See *State v. French, supra*. The first information against Vasquez was dismissed on May 26, 2006, and the second information was filed on August 16. Because both May 26 and August 16 are chargeable to the State, the period excluded by tolling is 81 days. After adding

this period, but not yet considering any excludable periods, the last date for commencement of trial was extended to September 12. We now turn to consideration of excludable time.

Uncontested Excludable Periods.

[5,6] The burden of proof is upon the State that one or more of the excluded time periods under § 29-1207(4) is applicable when the defendant is not tried within 6 months. *State v. Sommer*, 273 Neb. 587, 731 N.W.2d 566 (2007). To overcome a defendant's motion for discharge on speedy trial grounds, the State must prove the existence of an excludable period by a preponderance of the evidence. *Id.*

In the statement of facts in Vasquez' brief, he acknowledges that in the first prosecution, he filed a motion to suppress on March 17, 2006, and that the motion remained undisposed at the time of the State's dismissal. He implicitly concedes that this period is excludable.

[7] Section 29-1207(4)(a) excludes from speedy trial calculations the time from filing until final disposition of pretrial motions by the defendant, including motions to suppress. *State v. Dockery*, 273 Neb. 330, 729 N.W.2d 320 (2007). The 70-day period from March 17, 2006, to May 26, is clearly excludable under § 29-1207(4)(a). After adding 70 days to September 12, the last day for commencement of trial would have been Tuesday, November 21. Vasquez' motion for discharge was filed 7 days after the last day for commencement of trial, unless there were other excludable periods.

[8] Further, neither party disputes that when Vasquez filed his motion for absolute discharge, the speedy trial clock, if it had not already expired, again stopped. Where a motion to discharge on speedy trial grounds is submitted to a trial court, the excludable period attributable to a defendant's pretrial motion is calculated from the date the motion is filed until the date the motion is granted or denied. See *State v. Recek*, 263 Neb. 644, 641 N.W.2d 391 (2002), *disapproved in part on other grounds, State v. Feldhacker*, 267 Neb. 145, 672 N.W.2d 627 (2004). Thus, the period from November 28, 2006, when the motion was filed, to December 4, when the motion was overruled, is excluded under § 29-1207(4)(a). Because the trial was

then immediately held on December 4, the question becomes whether there is any other excludable period of at least 7 days. We now examine the additional periods of exclusion found by the district court.

Exclusion Relating to Plea Bargain.

The district court specifically found that two periods were excludable: (1) from the date of the plea agreement to the entry of the plea of not guilty in the first prosecution and (2) from the date of the not guilty plea in the first prosecution to the filing of the second prosecution. The district court did not articulate the statutory basis of such exclusions.

Several portions of these periods are not chargeable or excludable for reasons unrelated to the existence of a plea bargain. First, the plea agreement was reached prior to the filing of the first information. However, the speedy trial clock did not begin to run until the first information was filed. Thus, the period from the date of the plea agreement to the date of filing of the first information is not an excludable or chargeable period—it is simply irrelevant to the statutory speedy trial calculation. Second, as we explained above, the speedy trial time is tolled during the period between the dismissal of the first information and the filing of the second information. Third, the period relating to Vasquez' motion to suppress has already been excluded.

As a result, insofar as the plea bargain is concerned, we consider two periods: (1) from the filing of the first information (December 23, 2005) to the date of entry of the plea of not guilty (February 10, 2006) and (2) from the date of the plea to the date of filing of the motion to suppress (March 17). These represent periods of 49 days and 35 days, respectively. We now consider the district court's factual findings regarding an agreement.

The district court described the agreement as a "plea agreement" and found that the first prosecution proceeded "with the State complying with its portion of the agreement, and . . . Vasquez in fact performing his side of the agreement through the time of arraignment." Vasquez argues that there was no plea agreement but also argues that "[t]he bargaining positions were

clearly unequal and [Vasquez] thought he was bargaining for and receiving a free pass when in fact he was told later he had agreed to plead guilty to a reduced charge . . . .” Brief for appellant at 14-15. The State concedes that Vasquez’ agreement to plead guilty to a reduced charge was implied—acknowledging that “the words ‘you have to plead to the simple possession charge’ do not appear on the tape” and arguing that it was “obvious to everyone involved that a guilty plea to that charge was contemplated by all, as the [S]tate would not be able to recommend a sentence of probation if there is not a conviction on file.” Brief for appellee at 8. We determine that the court’s factual findings that there was a plea agreement and that both parties complied until the time of arraignment in the first prosecution are not clearly erroneous. We next consider the statutory basis for any further exclusion.

The State argues that § 29-1207(4)(a) provides the basis for exclusion, relying upon the language excluding the “period of delay resulting from other proceedings concerning the defendant.” Putting aside for the moment whether the State proved that there was a “period of delay,” we reject the State’s reliance upon § 29-1207(4)(a), because the plea agreement was not a “proceeding” within the meaning of the subsection.

[9] A “proceeding,” as used in the speedy trial statute provision governing delay resulting from proceedings concerning the defendant, is, in a more particular sense, any application to a court of justice, however made, for aid in the enforcement of rights, for relief, for redress of injuries, for damages, or for any remedial object. See *State v. Murphy*, 255 Neb. 797, 587 N.W.2d 384 (1998).

[10] The term “proceeding” must be read narrowly. *Id*. In *State v. Murphy*, the Nebraska Supreme Court explained that to the extent the parties relied on their own devices to secure necessary depositions, the taking of the depositions was not a “proceeding” within the meaning of § 29-1207(4)(a). We think that a plea bargain not entered into on the record before any court or tribunal, but, rather, made during private negotiations between the parties, is analogous to the private devices utilized to secure depositions.

In the instant case, the plea bargain made at the time of arrest clearly falls outside the definition of a "proceeding." The plea agreement was made prior to the commencement of any court proceeding. It certainly began as a purely private arrangement between the parties. As the Nebraska Supreme Court explained in *State v. Murphy*, "[i]f the term 'proceedings' was read broadly, rather than in its 'particular sense,' § 29-1207(4)(a) would include any delay at trial that 'concerns' the defendant." 255 Neb. at 803, 587 N.W.2d at 389.

[11,12] Thus, it appears that the basis for exclusion must be found, if at all, in the catchall exclusion for "good cause" provided by § 29-1207(4)(f). Under § 29-1207(4)(f), time may be excluded for a period of delay where good cause is shown. *State v. Covey*, 267 Neb. 210, 673 N.W.2d 208 (2004). Under a plain reading of § 29-1207(4)(f), before an evaluation for good cause need be made, there must first be a "period of delay." *State v. Covey, supra*. The district court did not make any findings relating to § 29-1207(4)(f).

[13] We think it is conceivable that, in theory, the conduct of parties relating to a plea bargain could constitute good cause for delay under § 29-1207(4)(f). But we are precluded from reaching this issue in the case before us by the absence of findings by the district court. "'[I]f a trial court relies on § 29-1207(4)(f) in excluding a period of delay from the 6-month computation, a general finding of "good cause" will not suffice and the trial court must make specific findings as to the good cause or causes which resulted in the extensions of time.'" *State v. Murphy*, 255 Neb. at 804, 587 N.W.2d at 389, quoting *State v. Kinstler*, 207 Neb. 386, 299 N.W.2d 182 (1980). See, also, *State v. Alvarez*, 189 Neb. 281, 202 N.W.2d 604 (1972).

[14] In the instant case, the district court made certain findings of historic fact, but the court did not make any finding regarding the causal connection, if any, between the plea bargain and any delay in the subsequent proceedings. Indeed, the court's findings did not identify a specific delay, but simply excluded certain broad periods of time, parts of which were irrelevant to the speedy trial calculation or already excluded under § 29-1207(4)(a). When a trial court's findings are incomplete, an

appellate court must remand the cause for further consideration. *State v. Murphy*, 255 Neb. 797, 587 N.W.2d 384 (1998).

Constitutional Right to Speedy Trial.

[15] Vasquez also argues that his constitutional right to a speedy trial was violated. An appellate court is not obligated to engage in an analysis that is not needed to adjudicate the controversy before it. *State v. Sommer*, 273 Neb. 587, 731 N.W.2d 566 (2007). Therefore, we do not address this issue.

CONCLUSION

We conclude that the district court erred in excluding any time periods relating to the plea bargain under § 29-1207(4)(a). Even if such periods may be excluded under § 29-1207(4)(f), the district court made no findings in that regard. Accordingly, we reverse, and remand with directions to the district court to determine whether, based on the existing record, the State proved by a preponderance of the evidence that the time from the filing of the first information to the entry of the plea of not guilty or the time from the entry of the plea to the filing of the motion to suppress, or both, is excludable for good cause, supported by specific findings.

REVERSED AND REMANDED WITH DIRECTIONS.

IN RE TRUST OF JOSEPH E.A. ALEXIS, DECEASED. CARL E. ALEXIS, APPELLANT, V. JOSEPHINE MOLLOY ET AL., TRUSTEES, APPELLEES.

IN RE TRUST OF MARJORIE E. ALEXIS, DECEASED. CARL E. ALEXIS, APPELLANT, V. JOSEPHINE MOLLOY ET AL., TRUSTEES, APPELLEES.

744 N.W.2d 514

Filed February 19, 2008. Nos. A-06-408, A-06-409.

1. **Trusts: Equity: Appeal and Error.** Appeals involving the administration of a trust are equity matters and are reviewable in an appellate court de novo on the record.
2. **Decedents' Estates: Appeal and Error.** In the absence of an equity question, an appellate court, reviewing probate matters, examines for error appearing on the record made in the county court.

3. **Judgments: Appeal and Error.** When reviewing a judgment for errors appearing on the record, the inquiry is whether the decision conforms to the law, is supported by competent evidence, and is neither arbitrary, capricious, nor unreasonable.
4. ____: ____. In instances when an appellate court is required to review cases for error appearing on the record, questions of law are nonetheless reviewed de novo on the record.
5. ____: ____. An appellate court, in reviewing a district court judgment for errors appearing on the record, will not substitute its factual findings for those of the district court where competent evidence supports those findings.
6. **Trusts.** Interpretation of the language of a trust is a matter of law.
7. **Judgments: Appeal and Error.** Regarding matters of law, an appellate court has an obligation to reach a conclusion independent of that of the trial court in a judgment under review.
8. **Trusts: Intent.** The rules of construction for interpreting a trust are applied when the language of the trust is not clear; but if the language clearly expresses the settlor's intent, the rules do not apply.
9. ____: ____. The primary rule of construction for trusts is that a court must, if possible, ascertain the intention of the testator or creator.
10. ____: ____. When there are two or more instruments relating to a trust, they should be construed together to carry out the settlor's intent.
11. **Decedents' Estates: Wills: Words and Phrases.** "By right of representation" means a devisee is entitled to take or receive a share of the estate on a per stirpes basis.
12. ____: ____: ____. A distribution per stirpes is one in which the beneficiaries take proportionate shares of the share of the ancestor through whom they claim as his or her representatives, and as such representatives, they will be entitled to take just as much as such ancestor would have taken and no more.
13. **Wills.** Clear and unambiguous provisions of the original will cannot be controlled by a subsequent codicil, the terms of which are confusing and ambiguous.
14. **Wills: Intent.** The intention of the testator is to be ascertained from a liberal interpretation and comprehensive view of all of the provisions of the will, and the court must base its interpretation upon the literal and grammatical meaning of the words and phrases as they appear in the will itself and take into account all the provisions set forth in the will.
15. **Trusts.** With certain exceptions, the Nebraska Uniform Trust Code, Neb. Rev. Stat. § 30-3801 et seq. (Cum. Supp. 2006), applies to all trusts created before, on, or after January 1, 2005, and to all judicial proceedings concerning trusts commenced on or after January 1, 2005.
16. ____. Neb. Rev. Stat. § 30-3879(b)(1) (Cum. Supp. 2006) requires certain trustees who are also beneficiaries to make certain discretionary distributions only in accordance with an ascertainable standard.
17. ____. Neb. Rev. Stat. § 30-3879(b)(1) (Cum. Supp. 2006) applies only to trusts which become irrevocable on or after January 1, 2005.
18. ____. Neb. Rev. Stat. § 30-3879(a) (Cum. Supp. 2006) requires that notwithstanding the breadth of discretion granted to a trustee in the terms of the trust, including the use of such terms as "absolute," "sole," or "uncontrolled," the trustee shall

exercise a discretionary power in good faith and in accordance with the terms and purposes of the trust and the interests of the beneficiaries.

19. ____. Under Neb. Rev. Stat. § 30-3849(d) (Cum. Supp. 2006), § 30-3849, which imposes limitations on the right of the creditor of a beneficiary to compel a distribution, does not limit the right of a beneficiary to maintain a judicial proceeding against a trustee for an abuse of discretion or failure to comply with a standard for distribution.
20. **Trusts: Courts: Jurisdiction.** Under Neb. Rev. Stat. § 30-3812 (Cum. Supp. 2006), the court may intervene in the administration of a trust to the extent its jurisdiction is invoked by an interested person or as provided by law, and a judicial proceeding involving a trust may relate to any matter involving the trust's administration, including a request for instructions and an action to declare rights.
21. ____: ____: ____. The comment to Unif. Trust Code § 201, 7C U.L.A. 455 (2006), allows, but does not require, invocation of the court's jurisdiction absent an actual dispute.
22. **Trusts.** Neb. Rev. Stat. § 30-3812 (Cum. Supp. 2006) does not limit to trustees the right to seek instructions from the court.
23. **Trusts: Declaratory Judgments.** Nebraska's declaratory judgment statutes allow trustees and persons interested in the administration of a trust to seek a declaration regarding any question arising in the administration of a trust.
24. **Declaratory Judgments.** As a general rule, there must be an actual case or controversy for a party to obtain a declaratory judgment.
25. **Courts: Justiciable Issues.** A court decides real controversies and determines rights actually controverted.

Appeal from the County Court for Lancaster County: LAURIE J. YARDLEY, Judge. Reversed and remanded with directions.

Patrick D. Timmer, of Pierson, Fitchett, Hunzeker, Blake & Katt, for appellant.

David W. Rowe and Julianne M. Spatz, of Kinsey, Rowe, Becker & Kistler, L.L.P., for appellees.

INBODY, Chief Judge, and CARLSON and CASSEL, Judges.

INBODY, Chief Judge.

INTRODUCTION

Carl E. Alexis (Appellant) appeals the order of the Lancaster County Court in the trust administration action he initiated to obtain interpretation or construction of the last wills and codicils of his grandparents, Joseph E.A. Alexis and Marjorie E. Alexis (collectively Testators). Testators' last wills and codicils established trusts, of which Testators' remaining children,

the appellees in this matter, are trustees. The proceedings for Testators' last wills and codicils were consolidated by the county court and remain consolidated on appeal. Because we conclude that the county court misinterpreted the last wills and codicils and is obligated to determine the extent of the trustees' discretion, we reverse, and remand with directions.

STATEMENT OF FACTS

Testators, now deceased, were husband and wife and had four children: Carl Odman Alexis, Josephine Alexis Molloy, Marjorie Alexis Todd, and Hilbert Verne Joseph Alexis. On January 4, 1958, Testators each executed their last wills. The last wills were essentially identical. Testators each disposed of their personal property and household items, made a marital bequest, and devised the residue to their trustees.

After the execution of their last wills, Testators executed nine codicils to their last wills. The last wills and the nine codicils were admitted to probate following the respective deaths of Joseph E.A. Alexis and Marjorie E. Alexis on August 15, 1969, and March 13, 1970. Upon the respective deaths of Testators, both testamentary trusts became irrevocable. Both of the testamentary trusts were confirmed by the county court.

At all times relevant to this case until 2005, all four of Testators' children were acting as trustees. On February 28, 2005, Carl Odman Alexis died, leaving his surviving siblings, the appellees, as trustees.

The trusts were each funded with parcels of real estate located in Nebraska through the residual distribution of each of Testators' estates. In 1990, upon the recommendation of a farm management firm, the trustees directed the sale of 40 acres and distributed the proceeds equally among themselves. Until the death of Carl Odman Alexis, the trustees directed the annual distribution of the farm income equally among themselves. After the death of Carl Odman Alexis, the surviving trustees directed the distribution of farm income from the trusts equally among themselves, the three surviving children of Testators, with no distribution to the issue of Carl Odman Alexis and his former wife, Maybritt Alexis: Appellant and his sister, Karin Alexis Frenze. Appellant subsequently initiated

trust administration proceedings. Because Testators' last wills and codicils are essentially identical, the matters were consolidated for trust administration proceedings.

At the trust administration proceedings, the parties did not dispute that the original last wills granted all of Testators' grandchildren a right to succeed to a present interest in the distribution of income and principal upon the death of their respective parents and that the grandchildren were granted the right to share in the distribution of the remainder of the trust assets upon termination of the trusts after the death of the last of Testators' children. The parties further stipulated that (1) the distribution of trust income is discretionary in the trustees, i.e., the trustees are not required to distribute trust income but are permitted to do so in certain circumstances; (2) whether to encroach upon or distribute the trust principal is discretionary with the trustees; (3) the trusts terminate when the last of Testators' children dies; and (4) upon termination of the trusts, the remaining assets shall be distributed in equal shares to Testators' grandchildren, with the share of any then-deceased grandchild distributed to such grandchild's surviving issue by right of representation.

Additionally, the parties stipulated:

> [Appellant] believes that the trustees' direction to the farm management company to make equal distributions of the trusts' net income to the surviving three children of the Testators is contrary to the terms of the trusts. Respondent trustees assert that their direction to the farm management company is pursuant to a correct interpretation of the applicable wills and codicils and the discretionary powers granted to them under the trusts.

We set forth the pertinent portions of the wills and relevant codicils in the analysis portion of this opinion. Because Testators' last wills and codicils are essentially identical for the purposes of our analysis, we will quote the last will and codicils of Joseph E.A. Alexis in the analysis portion of our opinion.

The issues before the county court were (1) what the beneficial interest of Testators' grandchildren was and (2) whether the county court should review the extent of the trustees' exercise of discretion. The county court found that the fourth, fifth, and

seventh codicils entirely eliminated Appellant's contingent right to succeed to a present interest in distributions of trust income and principal but left Appellant's remainder interest unchanged. The county court further found that the ninth codicil changed the rights of all the other grandchildren and treats them equally with Appellant and his sister by directing the trustees to distribute income and principal primarily to Testators' children while Testators' children are still living, and only as a final distribution to the grandchildren as remaindermen upon the death of the last of Testators' children. Appellant filed timely appeals, and the appeals were consolidated.

ASSIGNMENTS OF ERROR

Appellant assigns that the county court erred in (1) finding that the fourth, fifth, and seventh codicils entirely eliminated his right to succeed to a present interest in distribution of trust income and principal upon the death of his father, (2) finding that the ninth codicil changed the rights of all of Testators' grandchildren such that only Testators' children were entitled to distributions while Testators' children were still living and that the grandchildren were only entitled to distribution of the remaining assets upon termination of the trusts, (3) finding that it was not proper to review the extent of the trustees' discretion, and (4) not determining that the extent of the trustees' discretion was limited.

STANDARD OF REVIEW

[1] Appeals involving the administration of a trust are equity matters and are reviewable in an appellate court de novo on the record. *In re R.B. Plummer Memorial Loan Fund Trust*, 266 Neb. 1, 661 N.W.2d 307 (2003).

[2-5] In the absence of an equity question, an appellate court, reviewing probate matters, examines for error appearing on the record made in the county court. *In re Trust Created by Inman*, 269 Neb. 376, 693 N.W.2d 514 (2005); *In re Trust of Rosenberg*, 269 Neb. 310, 693 N.W.2d 500 (2005). When reviewing a judgment for errors appearing on the record, the inquiry is whether the decision conforms to the law, is supported by competent evidence, and is neither arbitrary, capricious, nor unreasonable.

Id. In instances when an appellate court is required to review cases for error appearing on the record, questions of law are nonetheless reviewed de novo on the record. *Stover v. County of Lancaster*, 271 Neb. 107, 710 N.W.2d 84 (2006). An appellate court, in reviewing a district court judgment for errors appearing on the record, will not substitute its factual findings for those of the district court where competent evidence supports those findings. *Schwarting v. Nebraska Liq. Cont. Comm.*, 271 Neb. 346, 711 N.W.2d 556 (2006).

[6,7] Interpretation of the language of a trust is a matter of law. *Smith v. Smith*, 246 Neb. 193, 517 N.W.2d 394 (1994). Regarding matters of law, an appellate court has an obligation to reach a conclusion independent of that of the trial court in a judgment under review. *Id.*

ANALYSIS

Impact of Fourth, Fifth, and Seventh Codicils on Appellant's Present Interest in Distribution of Trust Income and Principal.

[8-10] Appellant asserts that the county court erred in finding that the fourth, fifth, and seventh codicils eliminated Appellant's right to succeed to a present interest in the distribution of trust income and principal upon the death of his father. The rules of construction for interpreting a trust are applied when the language of the trust is not clear; but if the language clearly expresses the settlor's intent, the rules do not apply. *In re Wendland-Reiner Trust*, 267 Neb. 696, 677 N.W.2d 117 (2004). The primary rule of construction for trusts is that a court must, if possible, ascertain the intention of the testator or creator. *Id.*; *Smith v. Smith, supra*. When there are two or more instruments relating to a trust, they should be construed together to carry out the settlor's intent. *In re Wendland-Reiner Trust, supra*. Thus, we must first determine whether the language of the trusts and Testators' intent is unclear with respect to the present interest of Appellant and his sister, such that the rules of construction for interpreting the trusts apply.

The last wills state, in relevant part:

> III.
>
> All of the rest, residue and remainder of my estate I give, devise and bequeath to Carl Odman Alexis, John F. Molloy

and Marjorie Alexis Todd, as trustees for the beneficiaries herein designated, for the following uses and purposes, and subject to the following terms and conditions:

(A) Beneficiaries of the trust. The beneficiaries of this trust shall consist of the following persons or classes of persons:

(1) During the balance of her lifetime, my wife, Marjorie E. Alexis, shall be a beneficiary of the trust. In making distribution of income or principal from the trust, it is my desire that the trustees first ascertain and consider that my wife is adequately provided for during her lifetime. Upon her death, all interest of my wife in this trust shall terminate.

(2) My children, Carl Odman Alexis of Bethesda, Maryland, Josephine Alexis Molloy of Tu[cs]on, Arizona, Marjorie Alexis Todd of Kansas City, Missouri, and Hilbert Verne Joseph Alexis, also known as Joseph Alexis, of Lincoln, Nebraska, are beneficiaries of this trust. It is my desire that my children shall share equally in my estate, but I recognize that circumstances may arise which would justify an unequal distribution of income or principal of the trust, and for that reason I desire that the proportion of income or principal of the trust allocated to my children or distributed to them for their care, support, comfort, well being and education be determined solely by the trustees in the exercise of their sound discretion in the light of the facts and circumstances then existing.

(3) Upon the death of any of my children, the issue of such deceased child shall succeed to his or her interest in the trust, by right of representation. It is my intention that the word "issue" shall include adopted children. Subject to the right of the trustees to encroach upon the principal of the trust and to allocate principal and income distributions in the manner provided for in this will, I desire that the principal of the trust shall ultimately vest in equal shares per capita in my grandchildren, or their issue, by right of representation. The word "grandchildren" as used in this will shall include adopted children of any child of mine.

(B) Dispositive provisions. The trustees shall hold, manage, invest and reinvest the trust property, shall collect

and receive the income thereof and after deducting all necessary expenses incident to the administration of the trust, shall dispose of the principal and income of the trust as follows:

(1) During the life of my wife, Marjorie E. Alexis, the trustees shall first provide for the needs and enjoyment of my wife, Marjorie E. Alexis, and to that end shall pay the net income from the trust and if necessary, the principal of the trust to her or shall use the same in her behalf at such times and in such amounts as the trustees, in their sole discretion determine, to be necessary or advisable. During said period the trustees shall also have the right to pay all or any portion of the net income and, if necessary, the principal of the trust to any other beneficiary or beneficiaries of the trust at such times and in such amounts as the trustees shall determine to be advisable if, in the sole discretion of the trustees, the needs and enjoyment of my wife, Marjorie E. Alexis, have been adequately provided for from the trust or from her own property or from any other source.

(2) After the death of my wife, Marjorie E. Alexis, the trustees shall pay the net income and if necessary, the principal from the trust at such times and in such amounts as the trustees, in their sole discretion, deem necessary or advisable for the care, support, comfort, enjoyment, education and well being of my children (Carl Odman Alexis, Josephine Alexis Molloy, Marjorie Alexis Todd and Hilbert Verne Joseph Alexis), and of their issue by right of representation.

(3) After the death of all of my children, the trustees shall distribute the principal and accumulated income of the trust in equal shares per capita to my grandchildren who are living at the time the last survivor of my children shall die. In the event any grandchild of mine shall have died prior to that time and shall have left issue surviving him or her and which issue is surviving at the time of the death of the last survivor of my children, such issue shall succeed to the interest in the trust of such deceased grandchild, by right of representation.

> (4) If any such grandchild or his issue by right of representation is under twenty-one (21) years of age at the time of the death of the last survivor of my children, the interest of such grandchild or issue shall be vested, but the trustees shall hold such interest as a separate trust until such grandchild or issue becomes twenty-one (21) years of age when the balance remaining in said trust shall be distributed free from trust to such grandchild or issue.

The fourth codicil to the will states, in relevant part:

> I
>
> In my Will of January 4, 1958, I have provided that upon the death of any of my children, the issue of such deceased child shall succeed to his or her interest in the trust therein provided by right of representation. This provision is herewith reaffirmed except for the two issue of my son, Carl Odman Alexis, that is, Carl Erik Alexis and Karin May Alexis, who shall not succeed to his and her interest in the trust—which interest in the trust shall, nevertheless, vest on the death of their father—until the death of their mother, Maybritt Alexis, who is now divorced from Carl Odman Alexis, and until the death of Maybritt Alexis, all of Carl Erik Alexis' and Karin Alexis' interest in the trust property shall be held, managed, invested or reinvested by the Trustees as a separate trust.
>
> II
>
> Except to the extent as I have herein expressly provided to the contrary, I hereby ratify and confirm all of the provisions and terms of my Will of January 4, 1958, as modified by the second codicil to the Will, and as modified by the third codicil to the Will, and as modified by this codicil to said Will, and I declare said Will as so modified by said codicil to my Last Will.

There is no dispute that the last wills established Testators' intent that the grandchildren succeed to a present interest in the distribution of trust income and principal upon the deaths of their respective parents. The parties also apparently agree, as do we, that the fourth codicil (1) delayed Appellant's and his sister's succession to the interest of their father until the death of their father and their mother and (2) created a separate trust

to hold trust distributions made with respect to Appellant's and his sister's present interest until the death of their mother. The parties disagree regarding the interpretation of the fifth and seventh codicils.

In relevant part, the fifth codicil states:

> I
>
> In my Will of January 4, 1958, the beneficiaries of the trust are set out therein, and this entire provision is herewith reaffirmed except for my son, Carl Odman Alexis, who shall not be a beneficiary of said trust in that he has already been adequately provided for by me, and I expressly revoke his designation as a beneficiary of any trust established under my Will; however, his two children specified in the fourth Codicil dated November 30, 1962, shall succeed per capita with issue of my other three children to his or her interest in the trust after the demise of my daughter, Josephine Alexis Molloy, my daughter, Marjorie Alexis Todd, and my son, Hilbert Verne Joseph Alexis, also known as Joseph Alexis.
>
> . . . .
>
> III
>
> Except to the extent that I have herein expressly provided to the contrary, I hereby ratify and confirm all of the provisions and terms of my Will as modified by Codicils, and I declare said Will as so modified to be my Last Will.

The seventh codicil to the will states, in relevant part:

> I.
>
> I hereby expressly revoke that portion of Paragraph I of the fifth Codicil to my Will quoted as follows: "In my Will of January 4, 1958, the beneficiaries of the trust are set out therein, and this entire provision is herewith reaffirmed except for my son, Carl Odman Alexis, who shall not be a beneficiary of said trust in that he has already been adequately provided for by me, and I expressly revoke his designation as a beneficiary of any trust established under my Will;" and I now will and direct that my son, Carl Odman Alexis, shall be and become a beneficiary of the trust set out in Paragraph III (A) of my original Last Will and Testament of January 4, 1958, it being my intention

> that he shall have the same status as a beneficiary of said trust as my other children named therein, and that the provisions contained in Paragraph III (A) of my said Will shall stand as originally executed on January 4, 1958, insofar as my said son, Carl Odman Alexis, is concerned, and that he shall be restored to the same status as originally provided in Paragraph III (A) of my said Last Will and Testament of January 4, 1958.
>
> II.
>
> Except to the extent that I have herein expressly provided to the contrary, I hereby ratify and confirm all of the provisions and terms of my Will, as modified by Codicils, and I declare said Will, so modified, to be my Last Will and Testament.

[11,12] Without question, the fifth codicil revoked Carl Odman Alexis' interest in the trust, and the seventh codicil reinstated that interest. In revoking Carl Odman Alexis' interest, the fifth codicil also revoked Appellant's and his sister's right to succeed to their father's interest, as there was none. See *In re Estate of Tjaden*, 225 Neb. 19, 402 N.W.2d 288 (1987) ("by right of representation" means devisee is entitled to take or receive share of estate on per stirpes basis; distribution per stirpes is one in which beneficiaries take proportionate shares of share of ancestor through whom they claim as his or her representatives, and as such representatives, they will be entitled to take just as much as such ancestor would have taken and no more).

However, because the status of Appellant's and his sister's present interest following the seventh codicil, which reinstated their father's interest, is not explicitly stated, the codicils are not clear, and we must apply the rules of construction. We must, if possible, ascertain the intention of Testators. See, *In re Wendland-Reiner Trust*, 267 Neb. 696, 677 N.W.2d 117 (2004); *Smith v. Smith*, 246 Neb. 193, 517 N.W.2d 394 (1994).

When the fifth codicil revoked the interest of Appellant and his sister's father, there was no longer anything to fund the separate trust established by the fourth codicil, because the source of the separate trust was their father's interest; however, when the seventh codicil reinstated the interest of their father,

income to fund the separate trust provided for in the fourth codicil would be available.

By operation of the seventh codicil, Carl Odman Alexis was a lifetime beneficiary of the trusts as though he had never been removed, the fifth and seventh codicils having effectively canceled each other out. As noted, there is no express language affecting Appellant's and his sister's present interest or their right to succeed to the present interest. The seventh codicil does, however, state that "the provisions contained in Paragraph III (A) of my said Will shall stand as originally executed." That paragraph provides, in part:

> (3) Upon the death of any of my children, the issue of such deceased child shall succeed to his or her interest in the trust, by right of representation. . . . Subject to the right of the trustees to encroach upon the principal of the trust and to allocate principal and income distributions in the manner provided for in this will, I desire that the principal of the trust shall ultimately vest in equal shares per capita in my grandchildren, or their issue, by right of representation.

Consequently, in the seventh codicil, Testators restated by reference their intent that their grandchildren would succeed to a present interest in the distribution of trust income and principal upon the deaths of their respective parents. In Appellant's and his sister's case, that right was limited by the provisions of the fourth codicil. Had Testators died after executing the fifth codicil but before executing the seventh codicil, Appellant's and his sister's interest would have been eliminated. However, in reinstating Carl Odman Alexis' interest, Testators demonstrated their intention to also reinstate Appellant's and his sister's interest.

Therefore, we conclude that absent express language in the fifth and seventh codicils affecting Appellant's and his sister's present interest and in light of Testators' apparent intent, after the seventh codicil, Appellant and his sister were entitled to succeed to their present interest, subject to the limitations in the fourth codicil and the trustees' right to encroach upon the principal of the trust, while the trusts remained in effect.

Impact of Ninth Codicil on Grandchildren's Interest.

Appellant contends that the county court erred in finding that the ninth codicil changed the rights of all of Testators' grandchildren such that the grandchildren are only entitled to a remainder interest.

The ninth codicil states, in relevant part:

> I.
>
> I reaffirmthe [sic] broad discretion given to the Trustees to act freely under all or any of the powers given to them in this Will, but I do direct that in the administration of the trust that the distribution of principal and income be primarily for the benefit of my wife, Marjorie, during her lifetime, and my children, Carl, Josephine, Marjorie and Joseph H. during their lifetime, and that final distribution of the remaining principal to my grandchildren is solely for the purpose of the dissolution of the trust.
>
> Also, in knowledge of thefact [sic] that existing provisions of my Will permit special consideration for the beneficiaries of this Trust as the circumstances may appear, I direct that the Trustees take such appropriate action in the distri bution [sic] of income and/or principal to my daughter, Josephine, so that said income or principal may not be diverted from the beneficiaries of this Will to strangers.
>
> Except to the extent that I have herein expressly provided to the contrary, I hereby ratify and confirm all of the provisions and terms of my last Will and Testament as modified by all of the Codicils thereto, and I declare said Will as so modified to be my Last Will and Testament.

The ninth codicil expressly directs the trustees to take action regarding distributions to Josephine Alexis Molloy to avoid any distributions being diverted to strangers. It is the language of the first paragraph that requires construction. See *In re Wendland-Reiner Trust*, 267 Neb. 696, 677 N.W.2d 117 (2004) (rules of construction for interpreting trust are applied when language of trust is not clear).

In the first paragraph of the ninth codicil, Testators reaffirm the trustees' broad discretion to act as provided in the last wills. That reaffirmation is followed by the words "but I do direct" and a reiteration of the last wills' statements that the trust be

administered primarily for the benefit of the surviving spouse and the children, as well as the direction that "final distribution of the remaining principal to my grandchildren is solely for the purpose of the dissolution of the trust." This quoted language is a reiteration of the last wills' provisions at paragraph III(A)(3) that the principal of the trust will ultimately vest in equal shares per capita in the grandchildren.

[13,14] Typically, the word "but" signifies "except for the fact," "unless," or "notwithstanding." See Merriam-Webster's Collegiate Dictionary 155 (10th ed. 2001). However, in this instance, it is followed by reiterations of existing provisions, none of which contradict the words preceding "but." Whatever the typical meaning of the word, in this context, it cannot signal a contradiction or limitation of the last wills' provisions from paragraph III(A)(3) that were reiterated. Moreover, clear and unambiguous provisions of the original will cannot be controlled by a subsequent codicil, the terms of which are confusing and ambiguous. See *In re Estate of Florey*, 212 Neb. 665, 325 N.W.2d 643 (1982). The intention of the testator is to be ascertained from a liberal interpretation and comprehensive view of all of the provisions of the will, and we must base our interpretation upon the literal and grammatical meaning of the words and phrases as they appear in the will itself and take into account all the provisions set forth in the will. *Id.*

The interpretation of codicils has been further explained as follows:

> Although the execution of a codicil usually denotes a change in the disposition of the estate, it is not infrequent that codicils are merely explanatory, made for the purpose of clarifying or making plain some provision of the will, and hence a codicil will be interpreted in the light of the general scheme of the will and not in isolation, and as far as is possible and practicable, the provisions of the will and codicil should be reconciled as one consistent whole, giving effect to every part.
>
> However, where the will and codicil are so conflicting or repugnant as to make them irreconcilable, the codicil will prevail, especially where the testator so provides, it being the last expression, but the codicil supersedes the

> will only to the extent of those provisions of the will that are inconsistent or in conflict with it, and the provisions of the will should not be disturbed further than is necessary to give effect to the codicil. . . . While the codicil will prevail where there is an irreconcilable conflict between it and the will, this rule will not be applied so as to effect an alteration, unless such an intention on the part of the testator is clearly and unequivocally expressed in the codicil. Where the testator specifies how his or her will as altered by a codicil is to read, the court must construe the two together as he or she directs.
>
> While the clear and definite language of a will should prevail over an obscure codicil, and a doubtful expression in a codicil will not alter a plain provision of the will, where the testator's purpose is clear, the court cannot restrict the codicil by any rule of construction to a meaning which would frustrate its intendment.

96 C.J.S. *Wills* § 879 at 296-99 (2001).

As we have already observed, the ninth codicil was not clearly contradictory to the last wills. In the absence of a clear intent to alter the last wills except with respect to Josephine Alexis Molloy, we conclude that the ninth codicil did not affect the grandchildren's present interest as set forth in the last wills, subject to the trustees' discretion.

Trustees' Discretion.

Finally, Appellant contends that the county court erred in finding that it was not proper to review the extent of the trustees' discretion and in not determining that the extent of the trustees' discretion was limited.

[15] We note that, with certain exceptions, the Nebraska Uniform Trust Code (NUTC), Neb. Rev. Stat. § 30-3801 et seq. (Cum. Supp. 2006), applies to all trusts created before, on, or after January 1, 2005, and to all judicial proceedings concerning trusts commenced on or after January 1, 2005. § 30-38,110. Therefore, generally, the NUTC applies to the trusts and proceedings at issue.

[16-19] While a specific provision of the NUTC does not apply because of an exception, a general provision affecting

the nature of a trustee's discretion does affect our analysis. Section 30-3879(b)(1), which requires certain trustees who are also beneficiaries to make certain discretionary distributions only in accordance with an ascertainable standard, does not apply in this case. See § 30-38,110(d) (§ 30-3879(b)(1) applies only to trusts which become irrevocable on or after January 1, 2005). However, § 30-3879(a) does apply to the instant case, and requires that

> [n]otwithstanding the breadth of discretion granted to a trustee in the terms of the trust, including the use of such terms as "absolute", "sole", or "uncontrolled", the trustee shall exercise a discretionary power in good faith and in accordance with the terms and purposes of the trust and the interests of the beneficiaries.

Thus, the trustees in the case before us are bound to exercise their discretionary powers in good faith and in accordance with the terms and purposes of the trust and the interests of the beneficiaries. Further, § 30-3849(d) states that § 30-3849, which imposes limitations on the right of the creditor of a beneficiary to compel a distribution, "does not limit the right of a beneficiary to maintain a judicial proceeding against a trustee for an abuse of discretion or failure to comply with a standard for distribution."

[20,21] The NUTC also authorizes a procedural method for court review of a beneficiary's substantive claim. Section 30-3812 provides:

> (a) The court may intervene in the administration of a trust to the extent its jurisdiction is invoked by an interested person or as provided by law.
>
> . . . .
>
> (c) A judicial proceeding involving a trust may relate to any matter involving the trust's administration, including a request for instructions and an action to declare rights.

The language of § 30-3812 is identical to that of Unif. Trust Code § 201, 7C U.L.A. 455 (2006). This court has previously considered the comments to the Uniform Trust Code in interpreting the NUTC. See *In re Charles C. Wells Revocable Trust*, 15 Neb. App. 624, 734 N.W.2d 323 (2007). The comment to § 201 states, in relevant part:

> Subsection (c) makes clear that the court's jurisdiction may be invoked even absent an actual dispute. Traditionally, courts in equity have heard petitions for instructions and have issued declaratory judgments if there is a reasonable doubt as to the extent of the trustee's powers or duties. The court will not ordinarily instruct trustees on how to exercise discretion, however.

7C U.L.A. at 455. The comment to § 201 allows, but does not require, invocation of the court's jurisdiction absent an actual dispute.

[22,23] In *In re Trust Created by Hansen*, 274 Neb. 199, 739 N.W.2d 170 (2007), the Nebraska Supreme Court observed that § 30-3812 does not limit to trustees the right to seek instructions from the court. The court also noted that Nebraska's declaratory judgment statutes allow trustees and persons interested in the administration of a trust to seek a declaration regarding any question arising in the administration of a trust. *In re Trust Created by Hansen, supra*.

[24] In *In re Estate of Tizzard*, 14 Neb. App. 326, 335, 708 N.W.2d 277, 285 (2005), we stated the law applicable to obtaining a declaratory judgment:

> In order to grant declaratory relief, there must be a justiciable issue, meaning a present, substantial controversy between parties having adverse legal interests susceptible to immediate resolution and capable of present judicial enforcement. . . . "While not a constitutional prerequisite for jurisdiction of courts of the State of Nebraska (cf. U.S. Const. art. III, § 2), existence of an actual case or controversy, nevertheless, is necessary for the exercise of judicial power in Nebraska." . . . The Nebraska Supreme Court has said numerous times that it can declare the law and its application to a given set of facts only when a justiciable controversy is presented for determination and that it is not empowered to render advisory opinions.

(Citations omitted.) Thus, as a general rule, there must be an actual case or controversy for a party to obtain a declaratory judgment.

[25] There is no dispute that there was an actual controversy concerning the beneficial interest of Appellant and his sister in light of the fact that their father, Carl Odman Alexis, was

deceased. We have concluded above that Appellant's and his sister's present interest was reinstated by the seventh codicil and that the ninth codicil did not extinguish the grandchildren's present interest; and an additional actual controversy naturally arises from our conclusion: whether the trustees, in excluding Appellant and his sister, have been appropriately distributing proceeds from the sale of trust property. The county court, having concluded that Appellant's and his sister's interest was terminated, did not have this controversy before it. That is, because the county court found that Appellant and his sister were not entitled to succeed to their father's interest, there was no need to interpret the extent of the trustees' discretion. However, in light of our analysis above, a controversy exists regarding that discretion. Therefore, the county court is obligated to make that determination, and we direct the county court to determine the extent of the trustees' discretion on remand. See *Galyen v. Balka*, 253 Neb. 270, 570 N.W.2d 519 (1997) (court decides real controversies and determines rights actually controverted).

Appellant's final assignment of error is that the county court erred in not determining that the extent of the trustees' discretion was limited. Although we have concluded that the county court is obligated to determine the extent of the trustees' discretion, because the county court is in the best position to determine the extent of that discretion, we will not consider that issue and direct the county court to address it on remand.

CONCLUSION

For the foregoing reasons, we conclude that the county court misinterpreted the last wills and codicils and is obligated to determine the extent of the trustees' discretion. Accordingly, we reverse, and remand with directions to enter an order in accordance with this opinion.

REVERSED AND REMANDED WITH DIRECTIONS.

PHILIP DAUBENMIER, APPELLANT, V. CHARLES S. SPENCE, APPELLEE.

745 N.W.2d 348

Filed February 19, 2008. No. A-06-433.

1. **Negligence: Words and Phrases.** The defense of assumption of risk is derived from the maxim "volenti non fit injuria," which means that where one, knowing and comprehending the danger, voluntarily exposes himself to it, although not negligent in so doing, he is deemed to have assumed the risk and is precluded from a recovery for an injury resulting therefrom.
2. ____: ____. As currently codified, "assumption of risk" as an affirmative defense means that (1) the person knew of and understood the specific danger, (2) the person voluntarily exposed himself or herself to the danger, and (3) the person's injury or death or the harm to property occurred as a result of his or her exposure to the danger.
3. **Negligence.** The doctrine of assumption of risk applies a subjective standard, geared to the individual plaintiff and his or her actual comprehension and appreciation of the nature of the danger he or she confronts.
4. **Constitutional Law: Courts: Jurisdiction: Statutes.** Cases involving the constitutionality of a statute bypass the Nebraska Court of Appeals and are taken directly to the Nebraska Supreme Court.
5. ____: ____: ____: ____. The mere assertion that a statute may be unconstitutional does not automatically deprive the Nebraska Court of Appeals of jurisdiction over the case.
6. **Constitutional Law: Statutes: Appeal and Error.** For the constitutionality of a statute to be genuinely involved in an appeal, the constitutional issue must be real and substantial, not merely colorable.
7. **Constitutional Law: Courts: Jurisdiction: Statutes.** Where the constitutional challenge being raised has previously been resolved by the Nebraska Supreme Court, the case merely requires an application of unquestioned and unambiguous constitutional provisions, and jurisdiction to so hold lies in the Nebraska Court of Appeals.
8. **Constitutional Law: Statutes: Appeal and Error.** In addition to raising a real and substantial constitutional issue, a litigant seeking to challenge the constitutionality of a statute is required to comply with other clearly established procedural steps.
9. **Constitutional Law: Courts: Jurisdiction: Statutes.** When necessary to a decision in the case before it, the Nebraska Court of Appeals does have jurisdiction to determine whether a constitutional question has been properly raised.
10. **Constitutional Law: Rules of the Supreme Court: Statutes: Appeal and Error.** To properly raise a challenge to the constitutionality of a statute, a litigant is required to strictly comply with Neb. Ct. R. of Prac. 9E (rev. 2006) and to properly raise and preserve the issue before the trial court.
11. **Constitutional Law: Statutes: Service of Process.** If a statute is alleged to be unconstitutional, the Attorney General must be served with a copy of the proceeding and be entitled to be heard.

12. **Jury Instructions: Proof: Appeal and Error.** In an appeal based on a claim of an erroneous jury instruction, the appellant has the burden to show that the questioned instruction was prejudicial or otherwise adversely affected a substantial right of the appellant.
13. **Jury Instructions: Appeal and Error.** Jury instructions are subject to the harmless error rule, and an erroneous jury instruction requires reversal only if the error adversely affects the substantial rights of the complaining party.

Appeal from the District Court for Douglas County: JAMES T. GLEASON, Judge. Affirmed.

Christopher D. Jerram, of Kelley & Lehan, P.C., for appellant.

Robert S. Keith and Kellie R. Harry, of Engles, Ketcham, Olson & Keith, P.C., for appellee.

IRWIN, SIEVERS, and MOORE, Judges.

IRWIN, Judge.

I. BACKGROUND

This case originated as a result of a single vehicle accident on April 5, 2003, in which Philip Daubenmier was a passenger and Charles S. Spence was the driver. The record indicates that both Daubenmier and Spence spent several hours at various bars in downtown Omaha, purchasing alcohol for each other and drinking, before the two got into Spence's vehicle, began to leave the area, and Spence hit a light pole. Daubenmier suffered injuries as a result of the accident and brought suit against Spence. Spence pled, as affirmative defenses, that Daubenmier assumed the risk and that he failed to mitigate his injuries by wearing a seat belt. Spence admitted liability for the accident, and the issue at trial was what, if any, monetary damages Daubenmier should be awarded. The jury found in favor of Spence, returning a verdict for $0. This appeal followed. The primary question presented on appeal concerns the application of the assumption of risk doctrine. More detailed facts will be set forth, as necessary, in the discussion section below.

II. ASSIGNMENTS OF ERROR

Daubenmier has assigned the following errors: that the district court erred in instructing the jury on Spence's assumption

of risk defense, that the district court erred in instructing the jury on Spence's defense that Daubenmier failed to mitigate his damages by wearing a seatbelt, that the district court gave erroneous verdict forms, and that the district court erred in sustaining objections to Daubenmier's questioning of Spence.

We note that although Daubenmier has assigned error to the district court's sustaining of objections to Daubenmier's questioning of Spence, he failed to specifically argue this assignment of error in his brief. To be considered by an appellate court, an alleged error must be both specifically assigned and specifically argued in the brief of the party asserting the error. *Olivotto v. DeMarco Bros. Co.*, 273 Neb. 672, 732 N.W.2d 354 (2007). We therefore will not consider this assigned error.

III. ANALYSIS

1. Assumption of Risk Instruction

Daubenmier first asserts that the district court erred in instructing the jury on Spence's defense that Daubenmier assumed the risk of injury in this case. Daubenmier asserts that the evidence was insufficient to support instructing the jury on assumption of risk; that the instructions actually given were cumulative, confusing, and misleading to the jury; and that the statute authorizing assumption of risk as an affirmative defense violates equal protection.

(a) Sufficiency of Evidence

First, Daubenmier argues that the evidence was insufficient to support instructing the jury on assumption of risk. Daubenmier primarily argues that there was insufficient evidence to demonstrate that Daubenmier had knowledge of the specific danger of getting into Spence's vehicle after Spence had consumed an excessive amount of alcohol. We find sufficient evidence to demonstrate all of the required elements of assumption of risk, and we find this argument to be without merit.

[1,2] The defense of assumption of risk is derived from the maxim "'volent[i] non fit injuria,'" which means that "'where one, knowing and comprehending the danger, voluntarily exposes himself to it, although not negligent in so doing, he is deemed to have assumed the risk and is precluded from a recovery for

an injury resulting therefrom.'" *Burke v. McKay*, 268 Neb. 14, 20-21, 679 N.W.2d 418, 424 (2004), quoting *Hollamon v. Eagle Raceway, Inc.*, 187 Neb. 221, 188 N.W.2d 710 (1971). As currently codified, "assumption of risk" as an affirmative defense means that "(1) the person knew of and understood the specific danger, (2) the person voluntarily exposed himself or herself to the danger, and (3) the person's injury or death or the harm to property occurred as a result of his or her exposure to the danger." Neb. Rev. Stat. § 25-21,185.12 (Reissue 1995). Accord *Burke v. McKay, supra*. See, *Jay v. Moog Automotive*, 264 Neb. 875, 652 N.W.2d 872 (2002); *Pleiss v. Barnes*, 260 Neb. 770, 619 N.W.2d 825 (2000).

Spence argues that "[t]he Supreme Court of Nebraska has ruled, on several occasions, an intoxicated guest passenger can assume the risk of riding with a drunk driver." Brief for appellee at 9. Spence cites, in support of this statement, the cases of *Fortin v. Hike*, 205 Neb. 344, 287 N.W.2d 681 (1980); *Sandberg v. Hoogensen*, 201 Neb. 190, 266 N.W.2d 745 (1978); *Circo v. Sisson*, 193 Neb. 704, 229 N.W.2d 50 (1975); *Raskey v. Hulewicz*, 185 Neb. 608, 177 N.W.2d 744 (1970); and *Brackman v. Brackman*, 169 Neb. 650, 100 N.W.2d 774 (1960). Spence further asserts that "[i]n *Brackman*, *supra*, the court held the plaintiff passenger assumed the risk of his injury because he rode in the car with a driver who[m] he knew, or in the exercise of ordinary care and diligence should have known, was intoxicated. *Id.* at 659." Brief for appellee at 10.

Our review of *Brackman v. Brackman, supra*, however, indicates that the case does not involve an intoxicated guest passenger, a drunk driver, or the use of alcohol at all. Rather, the case involved an injury sustained by the operator of a cornpicker and a suit against the operator's employer. Although the case includes a discussion of assumption of the risk, the case neither stands for the proposition set forth by Spence nor includes the holding indicated by Spence and supported by Spence with a pinpoint cite. Similarly, *Fortin v. Hike, supra*, also cited by Spence as a case wherein the Supreme Court found a guest passenger had assumed the risk of riding with a drunk driver, involved neither a guest passenger nor any assertion of assumption of risk;

rather, the case involved questions of intoxication as evidence of negligence, not assumption of risk.

The inexplicable references to and erroneous discussion of *Brackman v. Brackman, supra*, and *Fortin v. Hike, supra*, notwithstanding, Spence is correct in asserting that the Nebraska Supreme Court has previously held that a guest passenger may be held to have assumed the risk of riding with a drunk driver. In *Sandberg v. Hoogensen, supra*, Dean M. Sandberg was a guest passenger in a vehicle driven by DeVern Hoogensen after the two men had been drinking together for several hours and an intoxicated Hoogensen had an accident that resulted in the death of both Hoogensen and Sandberg. The Supreme Court specifically held that a guest may be guilty of contributory negligence or assumption of risk by riding or continuing to ride with a driver whom the guest knows or, in the exercise of ordinary care and diligence, should know is so intoxicated that the driver is unable to operate the vehicle with proper prudence or skill. The court found the evidence sufficient to demonstrate that Sandberg knew or should have known that Hoogensen's state of intoxication was such that it would be dangerous to ride with him, and the court held that it was appropriate for it to instruct the jury on Hoogensen's estate's affirmative defense of assumption of risk. See, also, *Raskey v. Hulewicz, supra* (evidence warranted assumption of risk instruction in case involving guest passenger and drunk driver).

It is worth noting that since the Nebraska Supreme Court's decisions in *Sandberg v. Hoogensen, supra*, and *Raskey v. Hulewicz, supra*, the statute authorizing and defining assumption of risk has undergone one minor change. As Spence recognizes in his brief, Nebraska implemented its current form of comparative negligence in 1992. See Neb. Rev. Stat. § 25-21,185.07 et seq. (Reissue 1995). In so doing, the Legislature used § 25-21,185.12 to add the word "specific" to the element that assumption of risk requires the person to have known and understood the specific danger. See, also, *Pleiss v. Barnes*, 260 Neb. 770, 619 N.W.2d 825 (2000). As such, a review of the Supreme Court's assumption of risk cases since this statutory change is necessary to determining the application of the

assumption of risk statute to a case involving a guest passenger riding with a drunk driver.

In *Pleiss v. Barnes, supra*, the plaintiff brought a negligence action against a homeowner for injuries the plaintiff suffered as a result of a fall from a ladder while assisting in shingling the homeowner's roof. The evidence demonstrated that the fall occurred when the ladder "'flipped, twisted, and started to slide,' causing [the plaintiff] to fall from the ladder." *Id.* at 771, 619 N.W.2d at 827. The plaintiff argued that an assumption of risk instruction was not warranted because the homeowner had failed to show that the plaintiff understood the specific danger which caused him to fall. Although there was evidence that the plaintiff knew ladders could "'get shaky and fall,'" there was no evidence that the plaintiff was aware that the particular ladder, either because of its placement or because it was not tied down, created a specific danger that it could flip, twist, and slide, causing the plaintiff to fall. *Id.* Because the evidence failed to demonstrate any knowledge on the part of the plaintiff concerning the specific danger that caused his injury—the ladder flipping, twisting, and sliding, causing him to fall—an instruction on assumption of risk was not warranted.

Conversely, in *Burke v. McKay*, 268 Neb. 14, 679 N.W.2d 418 (2004), the Supreme Court found that the plaintiff had assumed the risk as a matter of law. In *Burke v. McKay*, the plaintiff was injured while competing in a high school rodeo when the horse he was riding "'stood up on his back legs and threw himself to the rear in such a way that [the horse] fell over backwards, suddenly crushing [the plaintiff] between [the horse's] back and the ground.'" *Id.* at 18-19, 679 N.W.2d at 422. In *Burke v. McKay*, the evidence demonstrated that the plaintiff had observed the same horse act in the same manner, falling backward onto its rider, on a previous occasion. As such, the Supreme Court held that the evidence demonstrated that the plaintiff knew of and understood the specific risk posed by the horse.

[3] The doctrine of assumption of risk applies a subjective standard, geared to the individual plaintiff and his or her actual comprehension and appreciation of the nature of the danger he or she confronts. *Burke v. McKay, supra*; *Pleiss v. Barnes, supra*. In *Pleiss v. Barnes*, the evidence failed to demonstrate

that the plaintiff had actual comprehension or appreciation of the danger that the ladder might flip, twist, and slide, causing him to fall, and thus the plaintiff did not assume the risk of that injury. In *Burke v. McKay*, the evidence did demonstrate that the plaintiff had actual comprehension or appreciation of the danger that the horse might fall over backward, suddenly crushing the plaintiff between the horse and the ground, and thus the plaintiff did assume the risk of that injury. We find the present case to be more similar to *Burke v. McKay* than *Pleiss v. Barnes*.

The record in the present case demonstrates that Daubenmier knew that it was dangerous to get into a car with somebody who had been drinking and knew that doing so could lead to death or serious injury. Daubenmier knew that both he and Spence had "more than average" to drink and had been drinking "fairly heavy." Daubenmier knew of the specific danger that caused his injury in this case: a driver who has had too much to drink might have an accident, resulting in death or serious injury. Just as the evidence supported a finding that the plaintiff in *Burke v. McKay* knew of the specific danger that caused his injury, the evidence supported such a finding in the present case. As such, the evidence was sufficient to support the giving of an assumption of risk instruction.

(b) Cumulative, Confusing, and Misleading

Daubenmier next argues that the assumption of risk instructions actually given were cumulative, confusing, and misleading. We find no merit to this assertion.

The instructions given to the jury included two instructions that explained the assumption of risk defense. These two instructions followed the recommended pattern jury instructions and only repeated the burden placed upon Spence to prove all three elements of the assumption of risk defense. The instructions also correctly set forth Nebraska law concerning assumption of risk, consistent with the above discussion of the defense. The instructions were not cumulative, were not confusing and misleading, and were not erroneous.

(c) Constitutionality of Statute

Finally, Daubenmier argues that the statute authorizing and defining assumption of risk as an affirmative defense violates

plaintiffs' equal protection rights and is unconstitutional. We conclude that Daubenmier failed to properly raise this claim involving the constitutionality of the statute.

[4,5] As the Nebraska Supreme Court recently noted, cases "'involving the constitutionality of a statute'" bypass the Nebraska Court of Appeals and are taken directly to the Nebraska Supreme Court. *State v. Nelson*, 274 Neb. 304, 308, 739 N.W.2d 199, 203 (2007). See, also, Neb. Rev. Stat. § 24-1106(1) (Reissue 1995). However, the mere assertion that a statute may be unconstitutional does not automatically deprive the Court of Appeals of jurisdiction over the case. *State v. Nelson, supra*. Rather, for a claim concerning the constitutionality of a statute to deprive the Nebraska Court of Appeals of jurisdiction, a variety of other requirements must be met.

[6,7] First, for the constitutionality of a statute to be genuinely involved in an appeal, the constitutional issue must be real and substantial, not merely colorable. *Id.* For example, where the constitutional challenge being raised has previously been resolved by the Nebraska Supreme Court, the case merely requires an application of unquestioned and unambiguous constitutional provisions, and jurisdiction to so hold lies in the Nebraska Court of Appeals. *Id.* Our research indicates that the constitutionality of § 25-21,185.12 was raised in *Pleiss v. Barnes*, 260 Neb. 770, 619 N.W.2d 825 (2000), but the Supreme Court declined to resolve the issue. As such, it appears that Daubenmier has raised a real and substantial constitutional issue.

[8-11] Nonetheless, in addition to raising a real and substantial constitutional issue, a litigant seeking to challenge the constitutionality of a statute is required to comply with other clearly established procedural steps. When necessary to a decision in the case before us, the Nebraska Court of Appeals does have jurisdiction to determine whether a constitutional question has been properly raised. *Olson v. Olson*, 13 Neb. App. 365, 693 N.W.2d 572 (2005). To properly raise a challenge to the constitutionality of a statute, a litigant is required to strictly comply with Neb. Ct. R. of Prac. 9E (rev. 2006) and to properly raise and preserve the issue before the trial court. See, *Olson v. Olson, supra* (requiring strict compliance with rule 9E);

State v. McKee, 253 Neb. 100, 568 N.W.2d 559 (1997) (requiring raising and preserving the issue before trial court). See, also, *State v. Schreck*, 226 Neb. 172, 409 N.W.2d 624 (1987) (failure to properly raise constitutionality issue in trial court results in waiver of issue). Additionally, if a statute is alleged to be unconstitutional, the Attorney General must be served with a copy of the proceeding and be entitled to be heard. Neb. Rev. Stat. § 25-21,159 (Cum. Supp. 2006).

Although the record in the present case indicates that Daubenmier asserted his challenge to the constitutionality of § 25-21,185.12 at the trial level and the trial court ruled on the challenge, and that Daubenmier complied with the requirements of rule 9E, the record does not indicate that Daubenmier served the Attorney General with a copy of the proceeding at the trial level. As a result, we conclude that Daubenmier's constitutional question has not been properly raised.

2. Seatbelt Instruction

Daubenmier next asserts that the district court erred in instructing the jury on Spence's defense that Daubenmier failed to mitigate his damages because he failed to wear his seatbelt. Daubenmier argues that the evidence was insufficient to support giving the instruction because the evidence did not establish that Daubenmier failed to wear his seatbelt and because the evidence indicated that he could have suffered the injuries even if he had been wearing a seatbelt. We conclude that we do not need to address whether the evidence was sufficient to warrant this instruction because the record demonstrates that the jury did not reach this issue.

[12,13] In an appeal based on a claim of an erroneous jury instruction, the appellant has the burden to show that the questioned instruction was prejudicial or otherwise adversely affected a substantial right of the appellant. *McClure v. Forsman*, 9 Neb. App. 669, 617 N.W.2d 640 (2000). Jury instructions are subject to the harmless error rule, and an erroneous jury instruction requires reversal only if the error adversely affects the substantial rights of the complaining party. *Id.*

Instruction No. 2 directed the jury, if it found that Spence had proven his affirmative defense of assumption of risk, to

use verdict form No. 1 and enter an award of $0. Instruction No. 2 also directed the jury, if it found that Daubenmier had not assumed the risk, to use verdict form No. 2 and then compute the amount of monetary damages to be awarded to Daubenmier. Instruction No. 14 directed the jury, if it assessed monetary damages against Spence, to reduce the amount of damages awarded according to directions given by the court. Because the jury returned verdict form No. 1, it is clear that the jury found that Spence had proven his affirmative defense of assumption of risk, awarded no monetary damages to Daubenmier, and never considered the instruction concerning how to reduce the damages award because of the seatbelt defense.

The record makes it clear in this case that the jury never reached the issue of the seatbelt defense. As such, we need not consider Daubenmier's arguments concerning the validity of the instruction. This assigned error is without merit.

3. Verdict Forms

Daubenmier next asserts that the verdict forms given by the district court were confusing. Specifically, Daubenmier argues that the combination of the seatbelt instruction and verdict form No. 2 was confusing to the jury because verdict form No. 2 failed to mention the seatbelt instruction or its calculation for reducing the damages award.

As noted, the jury in this case used verdict form No. 1, found that Spence had proven his assumption of risk defense, and awarded no monetary damages to Daubenmier. The jury did not reach verdict form No. 2 and never considered how to reduce a damages award, pursuant to the seatbelt instruction or otherwise. As such, the potential confusion argued by Daubenmier could not have occurred in this case. This assigned error is without merit.

IV. CONCLUSION

We find no merit to Daubenmier's assignments of error. We find that the evidence was sufficient to support instructing the jury on assumption of risk and that the instructions given were not cumulative, confusing, or misleading. This court cannot address the constitutional issue raised by Daubenmier. We also find that any potential errors concerning the seatbelt instruction

or verdict form No. 2 would have been harmless error because the jury never reached the seatbelt defense. We affirm.

AFFIRMED.

STATE OF NEBRASKA, APPELLANT, V.
SCOTT A. ANTONIAK, APPELLEE.
744 N.W.2d 508

Filed February 19, 2008. No. A-07-457.

1. **Sentences: Appeal and Error.** Whether an appellate court is reviewing a sentence for its leniency or its excessiveness, a sentence imposed by a district court that is within the statutorily prescribed limits will not be disturbed on appeal unless there appears to be an abuse of the trial court's discretion.
2. **Judges: Words and Phrases.** A judicial abuse of discretion exists only when the reasons or rulings of a trial judge are clearly untenable, unfairly depriving a litigant of a substantial right and denying a just result in matters submitted for disposition.
3. **Sentences: Probation and Parole: Appeal and Error.** When the State appeals from a sentence, contending that it is excessively lenient, an appellate court reviews the record for an abuse of discretion, and a grant of probation will not be disturbed unless there has been an abuse of discretion by the sentencing court.
4. **Sentences: Appeal and Error.** In excessively lenient sentence cases, an appellate court does not review the sentence de novo and the standard is not what sentence the appellate court would have imposed.
5. **Sentences.** The appropriateness of a sentence is necessarily a subjective judgment and includes the sentencing judge's observation of the defendant's demeanor and attitude and all the facts and circumstances surrounding the defendant's life.

Appeal from the District Court for Douglas County: JOSEPH S. TROIA, Judge. Affirmed.

Jeffrey J. Lux, Deputy Douglas County Attorney, for appellant.

Emil M. Fabian, of Fabian & Thielen, for appellee.

INBODY, Chief Judge, and CARLSON and CASSEL, Judges.

CASSEL, Judge.

INTRODUCTION

Following a bench trial, the district court for Douglas County convicted Scott A. Antoniak of first degree sexual assault and

sentenced Antoniak to 5 years' probation. The State of Nebraska appeals the sentence imposed on Antoniak as excessively lenient. Finding no abuse of discretion in the sentence of probation, we affirm the sentence of the district court.

BACKGROUND

On July 10, 2005, while Antoniak was on duty and dressed in his uniform as an Omaha police officer, he approached the victim, a prostitute. Antoniak ran the victim's name for outstanding warrants, discovered an active warrant for her arrest, and had the victim sit in the front seat of the police cruiser. Antoniak drove the cruiser a short distance and told the victim that she could point out the drug dealers, go to jail, or perform oral sex on him. The victim chose the last option and preserved some of Antoniak's semen. The State charged Antoniak with first degree sexual assault. Following a bench trial, the district court convicted Antoniak of the charge and sentenced him to 5 years' probation.

Pursuant to Neb. Rev. Stat. §§ 29-2320 and 29-2321 (Cum. Supp. 2006), the State requested and received the Attorney General's approval to appeal the sentence as excessively lenient.

ASSIGNMENT OF ERROR

The State alleges that the district court abused its discretion in imposing an excessively lenient sentence.

STANDARD OF REVIEW

[1,2] Whether an appellate court is reviewing a sentence for its leniency or its excessiveness, a sentence imposed by a district court that is within the statutorily prescribed limits will not be disturbed on appeal unless there appears to be an abuse of the trial court's discretion. *State v. Moore*, 274 Neb. 790, 743 N.W.2d 375 (2008). A judicial abuse of discretion exists only when the reasons or rulings of a trial judge are clearly untenable, unfairly depriving a litigant of a substantial right and denying a just result in matters submitted for disposition. *Id.*

ANALYSIS

[3] When the State appeals from a sentence, contending that it is excessively lenient, an appellate court reviews the record

for an abuse of discretion, and a grant of probation will not be disturbed unless there has been an abuse of discretion by the sentencing court. *State v. Thompson*, 15 Neb. App. 764, 735 N.W.2d 818 (2007). As stated above, the district court convicted Antoniak of first degree sexual assault and imposed a sentence of 5 years' probation. First degree sexual assault is a Class II felony, which is punishable by 1 to 50 years' imprisonment. See Neb. Rev. Stat. §§ 28-105(1) (Cum. Supp. 2006) and 28-319(2) (Reissue 1995). Under Neb. Rev. Stat. § 29-2260 (Reissue 1995), a court may withhold a sentence of imprisonment

> unless, having regard to the nature and circumstances of the crime and the history, character, and condition of the offender, the court finds that imprisonment of the offender is necessary for protection of the public because:
>
> (a) The risk is substantial that during the period of probation the offender will engage in additional criminal conduct;
>
> (b) The offender is in need of correctional treatment that can be provided most effectively by commitment to a correctional facility; or
>
> (c) A lesser sentence will depreciate the seriousness of the offender's crime or promote disrespect for law.
>
> (3) The following grounds, while not controlling the discretion of the court, shall be accorded weight in favor of withholding sentence of imprisonment:
>
> (a) The crime neither caused nor threatened serious harm;
>
> (b) The offender did not contemplate that his or her crime would cause or threaten serious harm;
>
> (c) The offender acted under strong provocation;
>
> (d) Substantial grounds were present tending to excuse or justify the crime, though failing to establish a defense;
>
> (e) The victim of the crime induced or facilitated commission of the crime;
>
> (f) The offender has compensated or will compensate the victim of his or her crime for the damage or injury the victim sustained;
>
> (g) The offender has no history of prior delinquency or criminal activity and has led a law-abiding life for

a substantial period of time before the commission of the crime;

(h) The crime was the result of circumstances unlikely to recur;

(i) The character and attitudes of the offender indicate that he or she is unlikely to commit another crime;

(j) The offender is likely to respond affirmatively to probationary treatment; and

(k) Imprisonment of the offender would entail excessive hardship to his or her dependents.

In our review to determine whether the sentence was excessively lenient, we consider factors similar to those listed above under Neb. Rev. Stat. § 29-2322 (Reissue 1995), which provides in pertinent part:

> [T]he appellate court, upon a review of the record, shall determine whether the sentence imposed is excessively lenient, having regard for:
>
> (1) The nature and circumstances of the offense;
>
> (2) The history and characteristics of the defendant;
>
> (3) The need for the sentence imposed:
>
> (a) To afford adequate deterrence to criminal conduct;
>
> (b) To protect the public from further crimes of the defendant;
>
> (c) To reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense; and
>
> (d) To provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner; and
>
> (4) Any other matters appearing in the record which the appellate court deems pertinent.

At the time of sentencing, Antoniak was 29 years old. He was living with his wife and child and another child was expected in May 2007. He had obtained a bachelor's degree in criminal justice and had worked for the Omaha Police Department from November 2001 until he was fired in August 2005. Since that time, he had been employed as a laborer and then as a warehouse manager. Antoniak's criminal history consisted of a stop sign violation in 2002 for which he was not prosecuted. As

part of the presentence investigation report (PSI), Antoniak was asked to "[w]rite a complete description of the events that led to your arrest," and he responded, "On July 10, [2005,] while employed by the Omaha Police Dept. a female prostitute made an allegation of a sexual assault towards me while on duty. I was arrested for 1st degree sexual assault."

The probation officer who prepared the PSI stated:

> There are two aggravating facts against [Antoniak] regarding sentencing. One is the seriousness of this charge, which is a Class II felony. The other has to do with the circumstances, in that he used his position of authority as a police officer, and as such [was] held to a higher standard of conduct. It is because of these aggravating factors, in that it would depreciate the seriousness of the offense, that I do not recommend probation in this case.

On the sexual adjustment inventory administered as part of the PSI, Antoniak's scores fell within the problem risk range on two scales: the sex item truthfulness scale and the sexual assault scale.

During the sentencing hearing, the district court received Dr. Joseph L. Rizzo's psychological evaluation of Antoniak. The evaluation stated that Antoniak's risk assessment scales showed him to be at low risk for violence or reoccurrence of another sexual crime. Rizzo also stated that Antoniak was "manifesting appropriate anxiety, depression and guilt regarding the incident at hand and is seen to be an individual who could benefit from extended probation in an outpatient rehabilitation process." Rizzo anticipated that Antoniak "would do extremely well on probation." Antoniak apologized during the hearing for his actions and apologized to his "family and friends, the police department for the shame and embarrassment and pain that [he] caused everyone through this horrible mistake."

The State acknowledges that Antoniak has a low probability to reoffend, lacks a prior criminal record, and had been a positive member of the community, but argues that "[t]he nature and circumstances of this particular crime warrants [sic] a period of incarceration to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for committing a first degree sexual assault while in uniform." Brief

for appellant at 8. The State cites to cases from other jurisdictions in urging that a police officer who breaches the public trust by criminal acts should be denied probation. However, none of these cases held that failing to impose a prison sentence for an offense involving breach of the public trust by a police officer constituted an abuse of discretion. Rather, the appellate courts in the cases cited by the State simply held that the trial judge may weigh the breach of public trust as a factor in determining whether to grant or deny probation or a suspended sentence. See, *State v. Dockery*, 917 S.W.2d 258 (Tenn. App. 1995), *overruled on other grounds, State v. Troutman*, 979 S.W.2d 271 (Tenn. 1998); *Woodson v. State*, 608 S.W.2d 591 (Tenn. App. 1980). In the case before us, the record amply demonstrates that the sentencing judge expressly considered and weighed this factor.

[4,5] In cases such as this, we do not review the sentence de novo and the standard is not what sentence we would have imposed. *State v. Thompson*, 15 Neb. App. 764, 735 N.W.2d 818 (2007). The appropriateness of a sentence is necessarily a subjective judgment and includes the sentencing judge's observation of the defendant's demeanor and attitude and all the facts and circumstances surrounding the defendant's life. *State v. Moore*, 274 Neb. 790, 743 N.W.2d 375 (2008). But there also must be some reasonable factual basis for imposing a particular sentence. *Id.*

The district court stated that Antoniak had abused his authority, took advantage of his authority, and became "a rogue cop." The court recognized that Antoniak had lost his job as a police officer. The court further stated:

> Now, what you did was serious and people believe that the seriousness of this crime demands imprisonment, yet, imprisonment is not the only form of punishment. Punishment should be a blending of deterrence, reformation and retribution. It should be a concern for the public and society. They must be protected. I don't know that this could ever happen again . . . by you. And whether it happens or not to this day . . . by other officers, I don't know, but hopefully they've learned something by what's happened to you. You can no longer use the color of your position to get what you want.

> You know, the major goals [sic] of sentencing is the offender should be dealt [with] in a manner that is most likely to avoid committing future crimes. You said this won't happen again. I believe it won't happen again.
>
> So through the years it's been found that probation should be a sentence unless confinement is necessary to protect the public, as I mentioned, for future activities. I don't believe that's going to happen. The offender is of need of correctional treatment which can most . . . effectively [be] provided in confinement. That isn't . . . a situation here. You have gone to Dr. Rizzo. You're willing to do what he recommends. I don't know that you could get that in confinement.
>
> And the third thing is it would unduly depreciate the offense in that you would be a threat, and I don't know that that is the situation. As I've said, I don't think you could do this again, not just because you're no longer a police officer, but because of what you've done to your family and your wife. You've got to look her in the eye everyday [sic]. You have to live with that.
>
> So taking into consideration what has happened up to this point, all the letters on your behalf, and those that believe jail is the answer, . . . I believe jail is not the answer at this time.

The probationary sentence imposed by the district court contained a number of terms and conditions. Antoniak must, of course, obey all laws and refrain from unlawful conduct. He must also remain gainfully employed or otherwise keep productively busy. He cannot possess a firearm or dangerous weapon. He must secure a travel permit before leaving Omaha. Antoniak must register as a sex offender and follow the laws and guidelines associated with such registration. He has to follow all recommendations of the psychological evaluation, including outpatient treatment. He must write letters of apology to the victim, to another individual who alleged Antoniak fondled her, to the Omaha police chief, and to the Omaha Police Department. He has to complete 250 hours of community service. Antoniak must also submit to a written report each month as directed by the probation officer and notify the probation officer prior to

any change of employment or residence. He has to submit his person, residence, business, and vehicle to search and seizure at any time by any law enforcement or probation officer with or without a search warrant. Antoniak must also pay court costs, a probation administrative enrollment fee, and a $25 monthly probation programming fee. Antoniak must comply with every one of these conditions of probation, or he will be subject to the filing of a motion to revoke his probation and the imposition of a new sentence.

We conclude that there was a reasonable factual basis for the sentence imposed and that the sentence did not constitute an abuse of the district court's discretion.

CONCLUSION

Because we conclude that the district court did not abuse its discretion in sentencing Antoniak, we affirm the sentence.

AFFIRMED.

COURTNEY S. JONES, INDIVIDUALLY AND AS PERSONAL REPRESENTATIVE OF THE ESTATE OF RICHARD E. JONES, DECEASED, APPELLANT, V. RONALD L. JONES AND JEAN MARIE JONES, APPELLEES.

747 N.W.2d 447

Filed February 26, 2008. No. A-05-1076.

1. **Directed Verdict: Appeal and Error.** In reviewing a trial court's ruling on a motion for directed verdict, an appellate court must treat the motion as an admission of the truth of all competent evidence submitted on behalf of the party against whom the motion is directed; such being the case, the party against whom the motion is directed is entitled to have every controverted fact resolved in its favor and to have the benefit of every inference which can reasonably be deduced from the evidence.
2. **Directed Verdict: Evidence.** A directed verdict is proper at the close of all the evidence only when reasonable minds cannot differ and can draw but one conclusion from the evidence, that is to say, when an issue should be decided as a matter of law.
3. **Jurisdiction: Appeal and Error.** Before reaching the legal issues presented for review, it is the duty of an appellate court to determine whether it has jurisdiction over the matter before it.

4. **Jurisdiction: Final Orders: Appeal and Error.** An appellate court is without jurisdiction to entertain appeals from nonfinal orders.
5. **Actions: Parties: Judgments.** Under Neb. Rev. Stat. § 25-1315(1) (Cum. Supp. 2006), the court may direct the entry of a final judgment as to one or more but fewer than all of the claims or parties only upon an express determination that there is no just reason for delay and upon an express direction for entry of judgment. In the absence of such determination and direction, any order or other form of decision, however designated, which adjudicates fewer than all the claims or the rights and liabilities of fewer than all the parties shall not terminate the action as to any of the claims or parties.
6. **Courts: Judgments.** When a trial court concludes that entry of judgment under Neb. Rev. Stat. § 25-1315(1) (Cum. Supp. 2006) is appropriate, it should ordinarily make specific findings setting forth the reasons for its order.
7. ____: ____. Courts considering certification of a final judgment should weigh factors such as (1) the relationship between the adjudicated and unadjudicated claims; (2) the possibility that the need for review might or might not be mooted by future developments in the trial court; (3) the possibility that the reviewing court might be obliged to consider the same issue a second time; (4) the presence or absence of a claim or counterclaim which could result in setoff against the judgment sought to be made final; and (5) miscellaneous factors such as delay, economic and solvency considerations, shortening the time of trial, frivolity of competing claims, expense, and the like.

Appeal from the District Court for Dundy County: JOHN J. BATTERSHELL, Judge. Appeal dismissed.

R.K. O'Donnell, Robert B. Reynolds, and James R. Korth, of McGinley, O'Donnell & Reynolds, P.C., L.L.O., for appellant.

Terrance O. Waite and S. David Schreiber, of Waite, McWha & Harvat, for appellees.

INBODY, Chief Judge, and IRWIN and MOORE, Judges.

INBODY, Chief Judge.

INTRODUCTION

Courtney S. Jones, personal representative of the estate of her late husband, Richard E. Jones, appeals the order of the district court for Dundy County, in her suit against her in-laws Ronald L. Jones and Jean Marie Jones, that sustained Ronald and Jean Marie's motion for directed verdict on Courtney's cause of action for an accounting. We dismiss this appeal, case No. A-05-1076, for lack of jurisdiction.

STATEMENT OF FACTS

Courtney, personal representative of Richard's estate, filed a petition against Ronald and Jean Marie, alleging, inter alia, that a partnership existed between Richard and Ronald, and seeking, in its first cause of action, an accounting regarding the alleged partnership. The petition asserted three additional causes of action: delivery, conversion, and material misrepresentation.

A trial was held on the cause of action for an accounting, and after the close of evidence, the trial court sustained Ronald and Jean Marie's motion for a directed verdict. In announcing its ruling from the bench, the trial court stated:

> [F]or appeal purposes, if you're thinking about appealing this we should probably enter an order today that says that's a final order, so that it is, because you have those other three.
>
> . . . .
>
> . . . I just wanted to point out that if there are any considerations regarding an appeal, that you may wish to have that clearly stated that it's a final order so you don't get up there and have it come back again.

The trial court specifically found that there was "no evidence regarding a partnership of any type or kind." In a journal entry, the trial court stated, "The Court ordered that [Courtney] is not entitled to an accounting on any theory presented and the first cause of action is dismissed." Courtney filed a motion for new trial, and the trial court overruled the motion, stating, "[T]he order overruling the Motion for New Trial should be and hereby is designated as a final order for purposes of appeal." In a docket entry, the trial court stated that its ruling "regarding the accounting was and is a final order and there was no reason to delay that ruling."

On September 8, 2005, Courtney filed a notice of appeal from the order overruling the motion for new trial and the journal entry dismissing her accounting cause of action, and the appeal was docketed as case No. A-05-1076. Courtney's brief alleges a sole assignment of error: that the trial court erred in granting a directed verdict in favor of Ronald and Jean Marie. She does not assign or argue that the trial court erred in overruling her motion for new trial.

In the trial court, Ronald and Jean Marie filed a motion for summary judgment as to Courtney's remaining causes of action for delivery, conversion, and material misrepresentation. On September 27, 2005, the trial court entered a journal entry sustaining the motion for summary judgment, specifically finding that Courtney had testified under oath that "she knows of no activity of [Ronald and Jean Marie] that would give rise to her causes of action," and dismissed Courtney's petition. On the same day, Courtney filed a notice of appeal of the trial court's order that granted Ronald and Jean Marie's motion for summary judgment. That appeal was docketed as case No. A-05-1176.

On October 14, 2005, we dismissed case No. A-05-1076 with the following docket sheet minute entry:

> Appeal dismissed by the court pursuant to Rule 7A(2). The district court's order is not a final and appealable order because it did not dispose of all the claims of all the parties as required by Neb. Rev. Stat. § 25-1315 (Cum. Supp. 2004). It is clear from the record that at least a counterclaim is still pending and possibly other causes of action.

It later came to our attention that the counterclaim referenced in this minute entry was erroneous because it was not in the present litigation, but instead in another suit which involved the same parties and which is not before this court at this time.

On October 21, 2005, Courtney filed a motion for reconsideration/motion to consolidate, requesting that we reconsider our dismissal of case No. A-05-1076 (cause of action for accounting) and consolidate it with case No. A-05-1176 (causes of action for delivery, conversion, and material misrepresentation). On December 22, we denied the motion on the basis that the order appealed from in case No. A-05-1076 did not dispose of all of Courtney's claims, and we denied the motion to consolidate. Thus, case No. A-05-1076 was dismissed for lack of a final order, and case No. A-05-1176 remained pending and has remained so throughout the appellate history of the litigation.

Subsequently, we reinstated case No. A-05-1076 and consolidated it with case No. A-05-1176 with the following docket sheet minute entry:

> It has come to the attention of the Court that the issues contained in A-05-1076 and A-05-1176 are interwoven and involved all four causes of action from the lower court. At the time that the appeal in A-05-1176 was filed, all issues had been disposed of by the district court and these cases should have been consolidated for appeal to this court. Although a previous motion to consolidate was denied, "[t]hrough this court's inherent judicial power, which is that power essential to the court's existence, dignity, and functions, we have authority to do all things that are reasonably necessary for the proper administration of justice." State v. Moore, 273 Neb. 495, 497, [730] N.W.2d [563], [564] (2007). Therefore, the mandate in A-05-1076 is hereby recalled and the appeal is reinstated. Case Nos. A-05-1076 and A-05-1176 are consolidated for oral argument and disposition.

On August 24, 2007, Ronald and Jean Marie filed a motion for dismissal of case No. A-05-1076 pursuant to Neb. Ct. R. of Prac. 7B(1) (rev. 2001), arguing that this court lacked jurisdiction. We heard oral arguments on both case No. A-05-1076 and case No. A-05-1176.

ASSIGNMENT OF ERROR

In case No. A-05-1076, Courtney alleges that the trial court erred in sustaining Ronald and Jean Marie's motion for directed verdict on her cause of action for an accounting.

STANDARD OF REVIEW

[1,2] In reviewing a trial court's ruling on a motion for directed verdict, an appellate court must treat the motion as an admission of the truth of all competent evidence submitted on behalf of the party against whom the motion is directed; such being the case, the party against whom the motion is directed is entitled to have every controverted fact resolved in its favor and to have the benefit of every inference which can reasonably be deduced from the evidence. *Livingston v. Metropolitan Util. Dist.*, 269 Neb. 301, 692 N.W.2d 475 (2005). A directed verdict is proper at the close of all the evidence only when reasonable minds cannot differ and can draw but one conclusion from the

evidence, that is to say, when an issue should be decided as a matter of law. *Gerhold Concrete Co. v. St. Paul Fire & Marine Ins.*, 269 Neb. 692, 695 N.W.2d 665 (2005).

ANALYSIS

[3,4] Before reaching the legal issues presented for review, it is the duty of an appellate court to determine whether it has jurisdiction over the matter before it. *Hallie Mgmt. Co. v. Perry*, 272 Neb. 81, 718 N.W.2d 531 (2006). Ronald and Jean Marie's latest motion asks us to consider whether the directed verdict from which Courtney now appeals was a final order for purposes of appeal. An appellate court is without jurisdiction to entertain appeals from nonfinal orders. *Id.*

[5-7] As described above, the trial court apparently attempted to certify as final the judgment for directed verdict out of which this appeal arises. In the recent case of *Cerny v. Todco Barricade Co.*, 273 Neb. 800, 733 N.W.2d 877 (2007), the Nebraska Supreme Court considered the conditions under which a trial court could certify a judgment as final under Neb. Rev. Stat. § 25-1315(1) (Cum. Supp. 2006), which provides:

> [T]he court may direct the entry of a final judgment as to one or more but fewer than all of the claims or parties only upon an express determination that there is no just reason for delay and upon an express direction for entry of judgment. In the absence of such determination and direction, any order or other form of decision, however designated, which adjudicates fewer than all the claims or the rights and liabilities of fewer than all the parties shall not terminate the action as to any of the claims or parties . . . .

The court stated that when a trial court concludes that entry of judgment under § 25-1315(1) is appropriate, it should ordinarily make specific findings setting forth the reasons for its order. *Cerny v. Todco Barricade Co., supra*. The court also discussed the criteria a trial court must consider in deciding whether to certify a final judgment under § 25-1315(1):

> [C]ertification of a final judgment requires a court to determine whether the case is the "unusual case" in which potential hardship to the litigants outweighs the strong policy against piecemeal appeals. Courts considering

> certification of a final judgment have weighed factors such as (1) the relationship between the adjudicated and unadjudicated claims; (2) the possibility that the need for review might or might not be mooted by future developments in the trial court; (3) the possibility that the reviewing court might be obliged to consider the same issue a second time; (4) the presence or absence of a claim or counterclaim which could result in setoff against the judgment sought to be made final; and (5) miscellaneous factors such as delay, economic and solvency considerations, shortening the time of trial, frivolity of competing claims, expense, and the like.

Cerny v. Todco Barricade Co., 273 Neb. at 812, 733 N.W.2d at 888. Under these factors, the court concluded that the trial court had abused its discretion in certifying a partial summary judgment as final under § 25-1315(1), vacated the order certifying a final judgment, and dismissed the appeal for lack of jurisdiction.

In the case before us, the trial court failed to state specific findings setting forth the reasons for its order as required by *Cerny v. Todco Barricade Co., supra*. Even if we were to assume the trial court's brief, unsigned docket entry was sufficient to certify the directed verdict as a final order, it appears that the nature of Courtney's claims is such that the trial court abused its discretion in attempting to certify the judgment as final. Courtney's claims are clearly interwoven. Courtney's primary claim in her cause of action for an accounting is that a partnership existed. The existence of a partnership is also important to her remaining claims of delivery, conversion, and material misrepresentation, although the absence of a partnership would not entirely vitiate her appeal from the summary judgment on her causes of action for conversion and material misrepresentation. Indeed, the piecemeal nature of the appeals in this case has occasioned the use of more judicial resources than a single appeal would have required. Based on *Cerny v. Todco Barricade Co.*, 273 Neb. 800, 733 N.W.2d 877 (2007), we conclude that the trial court did not certify its order for a directed verdict as a final order.

CONCLUSION

Based on the foregoing, we conclude that we do not have jurisdiction over case No. A-05-1076, and accordingly dismiss the appeal.

APPEAL DISMISSED.

WILLIAM KIRKWOOD ET AL., APPELLEES, V. STATE OF NEBRASKA, APPELLANT, AND SHELTER MUTUAL INSURANCE COMPANY, INTERVENOR-APPELLEE.

ROSS OSTERGARD, APPELLEE, V. STATE OF NEBRASKA, APPELLANT.

748 N.W.2d 83

Filed February 26, 2008. Nos. A-05-1226, A-06-630.

1. **Trial: Expert Witnesses: Appeal and Error.** An appellate court reviews the record de novo to determine whether a trial court has abdicated its gatekeeping function.
2. ____: ____: ____. Whether a witness is qualified as an expert is a preliminary question for the trial court. A trial court is allowed discretion in determining whether a witness is qualified to testify as an expert, and unless the court's finding is clearly erroneous, such a determination will not be disturbed on appeal.
3. **Rules of Evidence.** In proceedings where the Nebraska rules of evidence apply, the admission of evidence is controlled by rule and not by judicial discretion, except where judicial discretion is a factor involved in assessing admissibility.
4. **Trial: Expert Witnesses: Appeal and Error.** A trial court's ruling in receiving or excluding an expert's testimony which is otherwise relevant will be reversed only when there has been an abuse of discretion.
5. **Judgments: Words and Phrases.** An abuse of discretion occurs when a trial court's decision is based upon reasons that are untenable or unreasonable or if its action is clearly against justice or conscience, reason, and evidence.
6. **Tort Claims Act: Appeal and Error.** A district court's findings of fact in a proceeding under the State Tort Claims Act will not be set aside unless such findings are clearly erroneous.
7. **Tort Claims Act: Claims.** Whether the allegations made by a plaintiff constitute a claim under the State Tort Claims Act or whether the allegations set forth a claim that is precluded by the exemptions set forth in the act are questions of law.
8. **Negligence.** The question whether a legal duty exists for actionable negligence is a question of law dependent on the facts in a particular situation.
9. **Administrative Law: Judgments.** The district court's interpretation of the Manual on Uniform Traffic Control Devices presents a question of law.

10. **Judgments: Appeal and Error.** When reviewing questions of law, an appellate court has an obligation to resolve the questions independently of the conclusion reached by the trial court.
11. **Rules of Evidence: Expert Witnesses.** When a court is faced with a decision regarding the admissibility of expert opinion evidence, the trial judge must determine at the outset, in accordance with Neb. Evid. R. 702, whether the expert is proposing to testify to (1) scientific, technical, or other specialized knowledge that (2) will assist the trier of fact to understand or determine a fact in issue.
12. ____: ____. An expert's opinion is ordinarily admissible under Neb. Evid. R. 702 if the witness (1) qualifies as an expert, (2) has an opinion that will assist the trier of fact, (3) states his or her opinion, and (4) is prepared to disclose the basis of that opinion on cross-examination.
13. **Trial: Evidence.** A trial court may not abdicate it gatekeeping duty in a bench trial, but the court is afforded more flexibility in performing this function.
14. **Trial: Expert Witnesses.** A trial court adequately demonstrates that it has performed its gatekeeping duty in determining the reliability of expert testimony when the record shows (1) the court's conclusion whether the expert's opinion is admissible and (2) the reasoning the court used to reach that conclusion, specifically noting the factors bearing on reliability that the court relied on in reaching its determination.
15. ____: ____. Determining the weight that should be given expert testimony is uniquely the province of the fact finder.
16. **Tort Claims Act: Proof.** In order to recover in a negligence action brought under the State Tort Claims Act, a plaintiff must show a legal duty owed by the defendant to the plaintiff, a breach of such duty, causation, and damages.
17. **Governmental Subdivisions: Highways.** Concerning highways in general, the State has a duty to use reasonable and ordinary care in the construction, maintenance, and repair of its highways so that they will be reasonably safe for the traveler using them while exercising reasonable and ordinary care and prudence.
18. ____: ____. The State is not an insurer of the safety of travelers on its roads and highways.
19. **Negligence.** Advisory safety standards may represent a consensus of what a reasonable person in a particular industry would do, and therefore may be helpful to the trier of fact in deciding whether the standard of care has been met.
20. **Trial: Witnesses.** In a bench trial of a law action, the court, as the trier of fact, is the sole judge of the credibility of the witnesses and the weight to be given their testimony.
21. **Proximate Cause: Evidence.** The question of proximate cause, in the face of conflicting evidence, is ordinarily one for the trier of fact, and the court's determination will not be set aside unless clearly wrong.
22. **Proximate Cause: Words and Phrases.** A proximate cause is a cause that produces a result in a natural and continuous sequence, and without which the result would not have occurred.
23. **Negligence: Proximate Cause: Proof.** To establish proximate cause, there are three basic requirements: (1) The negligence must be such that without it, the injury would not have occurred, commonly known as the "but for" rule; (2) the

injury must be the natural and probable result of the negligence; and (3) there can be no efficient intervening cause.

24. **Negligence: Proximate Cause: Words and Phrases.** An efficient intervening cause is new and independent conduct of a third person, which itself is a proximate cause of the injury in question and breaks the causal connection between the original conduct and the injury. The causal connection is severed when (1) the negligent actions of a third party intervene, (2) the third party had full control of the situation, (3) the third party's negligence could not have been anticipated by the defendant, and (4) the third party's negligence directly resulted in injury to the plaintiff.
25. **Motor Vehicles: Right-of-Way.** A motorist has the duty to look both to the right and to the left and to maintain a proper lookout for the motorist's safety and that of others.
26. **Motor Vehicles: Highways.** Neb. Rev. Stat. § 60-6,119(1) (Reissue 2004) requires a driver to obey any traffic control devices.
27. **Damages: Evidence: Proof.** Damages for permanent impairment of future earning capacity may not be based on speculation, probabilities, or uncertainty, but must be shown by competent evidence that such damages are reasonably certain as the proximate result of the pleaded injury.
28. **Damages: Appeal and Error.** The determination of the amount of damages is a matter which is one solely for the fact finder, whose action in this respect will not be disturbed on appeal if it is supported by evidence and bears a reasonable relationship to the elements of damages proved.
29. **Pretrial Procedure.** A litigant has the right to have interrogatories answered, and the adversary has a continuing duty to supplement prior responses.
30. **Pretrial Procedure: Expert Witnesses: Trial.** When a party has failed to respond, or respond properly, to an interrogatory authorized by Neb. Ct. R. of Discovery 26(b)(4)(A)(i) (rev. 2000), or has failed to make supplemental responses required under rule 26(e)(1)(B), and such noncomplying party calls an expert witness to offer testimony within the scope of the interrogatory in question, the adverse party must object to a previously unidentified expert witness' testifying in general or object to testimony of an expert witness testifying about a previously undisclosed but discoverable matter sought to be disclosed by the interrogatory in question.
31. ____: ____: ____. If the court, over objection, allows an expert witness called by a party who has not properly responded to an interrogatory to testify, notwithstanding nondisclosure before trial, when appropriate the adverse party must move to strike the expert witness' testimony, request a continuance to give the surprised adversary an opportunity to investigate further and secure rebuttal evidence, or, under certain circumstances, move for a mistrial.
32. **Pretrial Procedure.** Generally, the control of discovery is a matter for judicial discretion.

Appeal from the District Court for Lincoln County: JOHN P. MURPHY, Judge. Affirmed.

Jon Bruning, Attorney General, and Matthew F. Gaffey for appellant.

Martin J. Troshynski, of Baskins, Pederson & Troshynski, Paul J. Hickey, of Hickey & Evans, L.L.P., and Mark A. Christensen, of Cline, Williams, Wright, Johnson & Oldfather, L.L.P., for appellees William Kirkwood et al.

P. Stephen Potter, P.C., for appellee Ross Ostergard.

IRWIN, SIEVERS, and CASSEL, Judges.

CASSEL, Judge.

I. INTRODUCTION

The State of Nebraska appeals from the judgments of the district court for Lincoln County, following separate bench trials, in favor of William Kirkwood, Robert Johnson, and Mavis Johnson (collectively Kirkwood Appellees) in case No. A-05-1226 and in favor of Ross Ostergard in case No. A-06-630 on their actions under the State Tort Claims Act, see Neb. Rev. Stat. § 81-8,209 et seq. (Reissue 2003), to recover damages sustained as a result of two separate two-vehicle collisions at an intersection where the northbound vehicles at issue did not stop. The district court determined that the State was negligent in failing to comply with the Manual on Uniform Traffic Control Devices (Manual) in placing stop signs and other warning devices at the intersection. In Kirkwood Appellees' case, the court determined that the State's negligence was the sole proximate cause of the damages sustained by Kirkwood Appellees. Approximately 7 months after the Kirkwood trial, the same district court judge held a bench trial in Ostergard's case and subsequently found that Ostergard was 40-percent negligent and that the State was 60-percent negligent. Following oral arguments in case No. A-05-1226 and pursuant to our authority under Neb. Ct. R. of Prac. 11B(1) (rev. 2006), we ordered case No. A-06-630 submitted without oral argument. We have consolidated these cases for purposes of opinion and disposition, and we affirm the district court's judgment in each case.

II. BACKGROUND

1. Intersection

The accidents at issue occurred at the intersection of a road called Newberry Access (Newberry Road) and U.S. Highway 30, which intersection is located at the east corporate limits of North Platte, Nebraska. Newberry Road runs north and south and has a speed limit of 55 miles per hour on the south leg and 50 miles per hour on the north leg. The north leg is also Highway 30, but to avoid confusion, we will refer to that section of the road as the north leg. Highway 30 runs east and west, and the speed limit is 60 miles per hour. The intersection was formerly a T-intersection, requiring a northbound traveler on the south leg of Newberry Road to turn onto Highway 30 at the intersection, and it is a "wide-throat intersection," meaning that it has a large turning radius to accommodate drivers turning right. In September 2002, the north leg opened for travel.

The terrain on the south leg of Newberry Road is fairly flat, and the road has a slight curve. A topography survey conducted in March 2005 showed that the south leg of Newberry Road sloped upward as it approached the intersection. Highway 30 is mostly level, but it is "super elevated" to keep the high-speed traffic from running off the curvature of the road. The elevation of Highway 30 at the intersection is lower than the grade of the south approach of Newberry Road. The north leg is elevated over railroad tracks.

A traffic engineering analyst for the Nebraska Department of Roads (DOR) testified that the north leg "might be a distraction" to a northbound driver. He explained that such a driver might think the grade separation where the north leg passes over the railroad is actually a highway interchange and would then expect the intersection to be closer to the grade separation. He testified that a northbound driver does not see Highway 30 pass through the intersection, partly because it is a superelevated curve. A deputy sheriff with the Lincoln County sheriff's office testified that a driver approaching the intersection from the south leg of Newberry Road would see, from a distance, the north leg but would not see Highway 30. But he testified that Highway 30 would be apparent once a

driver reached the stop signs at the intersection. North Platte Police Chief Martin Gutschenritter testified that an individual involved in an accident at the intersection called to share his concerns and told Gutschenritter that he was "'mesmerized by that overpass'" and that he thought Newberry Road "'was a straight shot through.'"

2. Signage and Signage Plans for Intersection

Traffic on Highway 30 does not stop or slow at the intersection. For the benefit of drivers approaching the intersection on the south leg of Newberry Road, there is a sign on the right side of the road designating a stop ahead with a plaque underneath that states "1500 FT." Approximately 500 feet later, a junction sign is located on the right side of the road, showing "4TH STREET" to the west (the west leg of Highway 30 is called Fourth Street) and "30" (designating the highway) to the north and to the east. An unspecified distance later, the words "STOP AHEAD" appear on the pavement. Then, a highway direction and distance sign is posted on the right side of the road, showing that North Platte is to the west and that an airport and Gothenburg, Nebraska, are a certain number of miles to the east. At the intersection, a stop sign is located in what appears to be the center of an island on the left side of the road and another stop sign is located an unspecified distance from the shoulder on the right side of the road. Pictures in the record show two reddish-orange flags protruding from the top of each stop sign.

According to the March 2002 signing plan of the DOR, rumble strips were intended to be placed on the south leg of Newberry Road by the time the north leg opened. The strips were to be placed approximately 100 feet before the stop ahead sign. The rumble strips were not in place at the time of the accidents. Nor was there a stop line, a solid white line used to indicate the point behind which vehicles are required to stop, on the pavement. The signing plan did not show a stop line or the "STOP AHEAD" pavement marking, but a "notes" section on the plan contained the statement, "ANY PAVEMENT MARKING SHOWN IS FOR INFORMATION ONLY."

Lester O'Donnell, a district highway engineer for the DOR, raised concerns to others within the DOR about the plans for

the intersection. Specifically, O'Donnell wanted stop control on Highway 30 and through traffic on Newberry Road. O'Donnell testified that he had recommended placing overhead stop signs at the intersection. The DOR determined that Highway 30 would not have stop control at the intersection, and the roadway design engineer in charge of the roadway design division of the DOR testified that the determination meant that the DOR would not have to reconstruct Highway 30. He explained that because travelers on Newberry Road would be stopping, they could then cross the superelevated curve of Highway 30 comfortably and safely at a low speed.

Jess Abasolo, a highway maintenance superintendent with the DOR, testified about his experience driving through the intersection, which he did at least once every other week. He testified that as he approached the stop ahead sign, he could turn his head, look forward toward the intersection, and see the stop signs. With regard to an exhibit that shows the stop ahead sign and the view looking north, Abasolo testified that he could not "make a clear picture" of the stop sign on the right side of the road and could not see the roadway of Highway 30 as it passed through the intersection. Abasolo testified that in looking at a photographic exhibit taken over 1,000 feet from the intersection, he could not see the stop sign on the right side of the road or the roadway of Newberry Road as it crossed Highway 30, but he could see the north leg of Newberry Road. With regard to a different photographic exhibit which showed the words "STOP AHEAD" on the pavement, Abasolo testified that a person located where the photograph was taken would be anywhere between 500 and 1,000 feet from the intersection when viewing the words. In looking at that exhibit, Abasolo testified that he could not see the roadbed of Highway 30 as it passed through the intersection, but that he could see the right-hand stop sign, stating, "The shape I can't tell. I just see the speck of red in there."

3. Kirkwood-Ostergard Collision

On October 10, 2002, at approximately 9:14 p.m., a collision occurred at the intersection. Kirkwood and his passenger were traveling west on the east leg of Highway 30, and Ostergard and his passenger, Julie Thomlison, were traveling north on the

south leg of Newberry Road. No citations were issued as a result of the accident. Prior to the Kirkwood trial, Kirkwood recovered $300,000 from Ostergard's insurance company and $100,000 under a provision of Kirkwood's insurance policy.

Thomlison testified that she had been with Ostergard through the same intersection at issue on two prior occasions. Thomlison testified that on the night of the accident, she could not get Ostergard to concentrate on his driving and Ostergard ran two red lights after they left a truckstop and just prior to the collision. Thomlison testified that as Ostergard's vehicle approached the intersection, Ostergard did not slow at all and did not look to the right or the left. Thomlison testified that she was upset with Ostergard over the accident and that she did not remember "a whole lot" of the accident. She admitted testifying in her deposition that she did not remember seeing a stop sign or an intersection and that "'[t]he only thing [she] remember[ed was] laying [sic] on the ground.'"

Ostergard testified only in case No. A-06-630. He testified that he had driven through the intersection when it was a T-intersection, which required him to stop before proceeding onto Highway 30. Ostergard denied running any stop signs or stop lights on the night of the accident on the way to the truckstop with Thomlison, but did not address whether he had done so after leaving the truckstop. He had no recollection of the events after leaving the truckstop other than proceeding north on Newberry Road.

4. Johnson-Podoll Collision

At approximately 10:25 a.m. on October 18, 2002, Coloradan Dean Podoll was traveling northbound on the south leg of Newberry Road with his wife. A collision occurred when Robert Johnson turned left from the north leg of Newberry Road onto Highway 30. A witness testified that Podoll's vehicle was traveling at a "pretty high speed" and did not slow at all. Podoll believed that he was driving under the speed limit.

Podoll testified in his deposition that as he approached the intersection, he did not see warning or stop signs due to a "truck/trailer" turning left. Podoll testified that he did not see the stop ahead sign. He testified, "[T]here was something parked on

the right-hand side of the road back further, too; but I couldn't tell you what it is or whereabouts it was or anything like that." Podoll knew he was approaching the junction of two roads, but he believed he had the right-of-way because the north leg was a bypass to get around North Platte and because he could "see far enough ahead to where the road continued, no forewarning signs." Podoll testified that he first noticed the stop signs after the accident and that he observed them from the back while he was out of his vehicle. Podoll testified that he told a police officer who had arrived at the scene, "'That stop sign needs more forewarning or needs to be better marked earlier.'"

5. Notice of Concern About Intersection

On October 14, 2002, Lincoln County Sheriff Jim Carman wrote a letter to O'Donnell stating in part, "[T]he stop signs which were placed to the right side of the road are so far to the right that they may not be noticed by someone intending to proceed on north or south across Highway #30." On October 15, Gutschenritter wrote a letter to O'Donnell about the intersection because, as he later testified at trial, people "were getting killed and they were getting seriously injured, and it was the frequency that disturbed [him] considerably." Gutschenritter called the intersection "suicidal."

After the accidents, on December 6, 2002, the DOR traffic engineering analyst who would later testify wrote a memorandum to the state traffic engineer concerning the intersection, which memorandum stated in part:

> Sheriff Carman noted the STOP sign on the south leg may be placed too far to the right to be noted by drivers. Photos taken by our data collector shows [sic] this could be a problem. The [Manual] indicates the STOP sign should be 12 feet from the edge of the pavement. The STOP sign on the right and the STOP sign on the median should be moved closer to the traffic and STOP bars should be added.

6. Manual

The DOR approved rules and regulations which adopted the 1988 edition of the Manual. These rules and regulations

were approved and filed with the Nebraska Secretary of State on November 4, 1994, and are codified in the Nebraska Administrative Code as title 411, chapter 1. These regulations were in full force and effect at the time of the accidents.

Section 1A-5 of the Manual addresses the meanings of "shall," "should," and "may" as those terms are used in the Manual:

> 1. SHALL-a *mandatory* condition. Where certain requirements in the design or application of the device are described with the "shall" stipulation, it is mandatory when an installation is made that these requirements be met.
>
> 2. SHOULD-an *advisory* condition. Where the word "should" is used, it is considered to be advisable usage, recommended but not mandatory.
>
> 3. MAY-a *permissive* condition. No requirement for design or application is intended.

Two experts provided testimony regarding the Manual: Eugene M. Wilson, a consultant in traffic engineering safety and education, testified on Kirkwood Appellees' behalf, and James L. Pline, a consulting traffic engineer, provided testimony for the State. Wilson testified that some of the research that he conducted was incorporated in the 1988 edition of the Manual, specifically in the area of symbol sign evaluation. Pline participated in the development of the 1988 Manual, principally in the areas of regulatory and warning signs.

Wilson testified that the reason for the distinction between "shall" and "should" is the existence of circumstances in the field that require the adjustment of the placement of traffic control devices, such as slopes and guardrails. Wilson testified, "The reason these guidelines are placed there as recommendations and provided as Should conditions is based on scientific based study. It doesn't say ignore these Should advisory conditions."

(a) Stop Signs

The Manual provides that the standard size of a stop sign shall be 30 by 30 inches, but that a larger size is recommended where greater emphasis or visibility is required. Both stop signs at the intersection were 36 by 36 inches.

Section 2A-21 of the Manual discusses standardization of location of signs in general:

> Standardization of position cannot always be attained in practice; however, the general rule is to locate signs on the right-hand side of the roadway, where the driver is looking for them. . . . Signs in any other locations ordinarily should be considered only as supplementary to signs in the normal locations.

Section 2B-9, the section of the Manual addressing location of stop signs in particular, states: "A STOP sign should be erected at the point where the vehicle is to stop or as near thereto as possible, and may be supplemented with a Stop line and/or the word STOP on the pavement . . . ." With respect to the lateral clearance of signs, section 2A-24 of the Manual states in part, "Signs should have the maximum practical lateral clearance from the edge of the traveled way for the safety of motorists who may leave the roadway and strike the sign supports." Section 2A-24 further provides, "Normally, signs should not be closer than 6 feet from the edge of the shoulder, or if none, 12 feet from the edge of the traveled way."

Daniel J. Waddle, a traffic control engineer in the DOR's traffic engineering division, testified that the DOR's practices with regard to the placement of stop signs are "[g]enerally to try to follow the guidelines of the [Manual], placing the stop sign . . . at the location a vehicle is intended to stop at; and for lateral, you know, placing them — if the [M]anual says six to twelve feet outside the shoulder or travel lane." Waddle testified that at the intersection, the stop sign on the left was placed in a "typical" island placement, which is 2 to 4 feet inside the island, centered on the nose of the island.

Wilson opined that the stop sign on the right side of the south leg of Newberry Road did not comply with the Manual "[b]ecause it's clearly not visible" and "[i]t's not located where the motorist is supposed to stop." He testified that the stop sign "clearly did not comply with recommended practice, the Should requirements associated with the Manual . . . which are advisory." Wilson testified that figure 2-2 in the Manual, illustrating placement of stop and yield signs at a wide-throat intersection, showed the typical placement of a stop sign to be 12 feet from the road. Figure 2-2 is labeled "[t]ypical locations for stop signs and yield signs," but section 2A-21, addressing standardization

of location, states, "Standard positions for a number of typical signs are illustrated in figures 2-1 to 2-4." Wilson testified that the placement of the stop sign on the right by the DOR was "clearly in excess of that by orders of magnitude." He stated, "It's not readily in the cone of vision of the motorist, it does not command motorist attention. That is a significant failure." He testified that the failure to move the stop sign closer to the road "significantly contributed to these accidents."

In a deposition, David B. Daubert, an engineer, testified, "According to . . . Wilson, the Stop sign [on the right] was not located appropriately. I can't tell you where it was located. I'm basing [Daubert's earlier statement that the sign was 'hard for the driver to find'] on [Wilson's] analysis that the Stop sign was too far to the right." When shown a picture of the stop signs at the intersection, Daubert testified, "That Stop sign is worse than I had ever imagined." When asked whether the stop signs were conspicuous, Daubert testified that the sign on the left was but that he was "not sure" if the sign on the right was conspicuous. He testified that the Manual stated that a stop sign should be placed in the driver's cone of vision rather than 12 feet from the edge of the road. Upon viewing a particular exhibit, Daubert testified that he could see the "STOP AHEAD" pavement marking and could see the stop sign located in the median in the same field of vision. He could not cite to any reason why a reasonably attentive driver would not be able to see the pavement marking and that stop sign.

Pline opined that the DOR fully met the provisions of the Manual with regard to the placement of the stop signs at the intersection. He testified that under the Manual, a stop sign on a wide-throat intersection "goes farther to the right in relation to the approach to the intersection." And Pline testified that when a stop sign is placed farther to the right, the Manual recommends installing a supplemental stop sign on the left for the benefit of drivers approaching the intersection who are either making a left turn or proceeding straight across the intersection. Pline testified that he looked at the devices along the south approach to the intersection and that a driver would readily "pick up" the traffic control devices, including the right-side stop sign, within a 10-degree cone of vision.

(b) Stop Ahead Sign and Pavement Marking

Section 2C-15 of the Manual provides that "[a] STOP AHEAD sign is intended for use on an approach to a STOP sign that is not visible for a sufficient distance to permit the driver to bring his vehicle to a stop at the STOP sign" and that "it may be used for emphasis where there is poor observance of the STOP sign." The Manual contains a table on the advance placement of warning signs, setting forth in section 2C-3 the "suggested minimum sign placement distances." For a stop condition on a road such as the south leg with a posted speed of 55 miles per hour, the minimum sign placement distance is 450 feet. Pline testified that he served on the task force that developed the original table in the 1970's and that he actually wrote the text and revised the table that were included in the 1988 Manual. He testified that the Manual did not contain criteria addressing maximum distance.

Wilson testified that the stop ahead sign, located 1,500 feet in advance of the stop location, was "three times further" away than it should be and that "it really loses its effectiveness." He testified that the advance location needed to be around 550 feet where the speed limit was in the neighborhood of 60 miles per hour. Daubert testified in his deposition that at 55 miles per hour, a driver's primary focus would be between 1,200 and 1,400 feet ahead. He testified that a driver, after driving by the stop ahead sign placed 1,500 feet in advance of the stop condition, would be focusing right at about where the stop sign would be located. Pline testified that the stop ahead sign in this case was given a "normal placement." He further testified that the Manual did not require a stop ahead sign for the intersection because "there was sufficient visibility and sight distance so the stop signs could be seen, but the Stop Ahead was put in as an . . . additional device to help the driver recognize the stop condition." Pline testified that the Manual did not require the "STOP AHEAD" pavement marking.

(c) Stop Line

Regarding stop lines, section 3B-17 of the Manual states in part, "If a stop line is used in conjunction with a STOP sign, it should ordinarily be placed in line with the STOP sign.

However, if the sign cannot be located exactly where vehicles are expected to stop, the Stop line should be placed at the stopping point." In section 3B-20 addressing pavement word and symbol markings, the Manual states, "The word 'STOP' shall not be used on the pavement unless accompanied by a stop line . . . and STOP sign . . . ."

Wilson testified that a stop line was needed at the intersection. He pointed out that the illustration in the Manual of stop sign placement at a wide-throat intersection showed a stop line. Pline testified that the Manual required a stop line when a "STOP" pavement marking was used, but not when a "STOP AHEAD" pavement marking was used. He explained that the Manual on this issue "was somewhat subject to interpretation" because it did not specify whether the stop line is mandated "when you use solely the word Stop or when you use Stop in itself[,] . . . and it didn't address what happens with a Stop Ahead sign." Pline initially agreed with Wilson's opinion: During Pline's deposition on December 23, 2004, he said, "'The absence of a stop line is the only [Manual] compliance issue.' " But Pline testified that he later thought such an interpretation did not "sound reasonable" and was not borne out by what he had "seen in the field." He testified that he reviewed the Manual and e-mailed "the chairman of [the] markings technical committee" asking whether he agreed with Pline's later interpretation that a stop line was not needed with a "STOP AHEAD" pavement marking. Pline testified that the chairman's response concurred with Pline's later interpretation and that Pline then notified counsel that he was incorrect in his deposition.

7. District Court's Judgment

(a) Case No. A-05-1226

On July 18, 2005, the district court entered judgment against the State. The court found that all the experts who testified were clearly qualified to render opinions, that the opinions were based on scientifically valid and reliable considerations, and that all the expert testimony was more probative than prejudicial. The court stated that it did not receive as expert testimony the testimony of Carman or Gutschenritter, or O'Donnell or any other employee of the DOR, and that it "accept[ed] the

testimony of all of these witnesses only to show that the State . . . received notice concerning possible dangers involving the intersection and the potential problems to be addressed."

The district court stated that the State had not waived its sovereign immunity with regard to the design of roadways and that the court did not question the design aspects of the intersection or the determination as to which traffic control devices to use at the intersection because such matters clearly fell within the discretionary function exception to the State Tort Claims Act. The court stated that it "is clear that the overpass ascending north of the intersection is a visual distraction to drivers" and that the signing plan called for rumble strips to be placed on Newberry Road "bracketing the 'stop ahead' sign in order to warn motorists." The court continued, "While the rumble bars are not governed by the [Manual], it is clear that the State . . . determined that they should be placed on the approach to the intersection." The district court further stated:

> The issues presented to the Court are whether . . . the State . . . fully complied with the [Manual], and, if not, whether such failure constituted negligence that proximately caused the accidents and injuries to [Kirkwood Appellees].
>
> A review of the evidence . . . makes it clear that the right-hand stop sign was to the right of the expansion joint a significant distance from the right-hand edge of Newberry [Road]. This stop sign had been in place prior to the opening of the intersection and appears to the Court to be angled towards traffic turning right on to [sic] US Highway 30. This placement does not comply with the [Manual] and the standard of placement of stop signs laterally from the edge of the highway at 12 feet. Figure 2-2 on page 2A-15 of the [Manual] shows a wide throat intersection with the clearance of the stop sign 12 feet from the right edge of the roadway. That diagram also shows a stop bar painted on the pavement. . . .
>
> In addition, the [Manual] sets a standard for placement of warning signs, such as the "stop ahead" sign in this case. On a roadway with a 55 miles per hour speed limit, it should be 450 feet from the actual stop condition. In the

> instant case, the sign was 1500 feet from the stop condition. In addition, the [Manual] in Section 3B-20 states that the word "stop" shall not be used on the pavement unless accompanied by a stop line or stop bar.

The district court found Wilson's testimony to be "fully credible" and compelling. The court stated that it could not find that Pline devoted as much time to the study of the intersection as did Wilson, that it was clear that Pline changed his opinion on the necessity of a stop line at the intersection, and that the court did not give the same weight to Pline's testimony and opinions as it did to the testimony of Wilson. The court accepted Wilson's testimony that the use of "should" in the Manual was never intended to be merely a suggestion but was adopted to allow leeway for road departments to comply with the Manual as closely as practicable.

The district court found ample evidence of negligence on the part of the State in its failure to comply with the Manual in the signage for the intersection. The court found that the State was negligent and in breach of its duty to the traveling public by its failure to place the right-hand stop sign in accordance with the Manual, in its failure to place the stop ahead sign within 500 feet of the intersection, in its failure to place a stop line at the intersection, and in its failure to place rumble strips on the south leg of Newberry Road. The court found such negligence to be the proximate cause of the accident and resulting injuries to Kirkwood Appellees. The district court entered the following money judgments against the State: $1,640,791.28 for Kirkwood, $1,458,975.82 for Robert Johnson, and $300,000 for Mavis Johnson.

(b) Case No. A-06-630

The matter came on for trial on January 31, 2006. The parties stipulated that they would submit the record of the Kirkwood trial as to the issue of liability and that such record "may be entered subject to the same objections that were made at the [Kirkwood] trial . . . and subject to the same rulings that were made by the Court in the Kirkwood trial." On March 23, the district court entered an amended order, finding the State negligent in its signage of the intersection by failing to have

the stop signs located in the proper manner and in its failing to place rumble strips on "the highway" (meaning Newberry Road) prior to the intersection. The district court stated:

> The State . . . raised an issue in regard to the testimony of . . . Wilson in the [Kirkwood] trial . . . which has been received in evidence in this trial. Assuming, arguendo, this Court should not consider the testimony of . . . Wilson in regard to the placement of the "stop ahead" sign, and [sic] there is still sufficient evidence of the State's negligence to hold [it] responsible for the accident that occurred in this case. Again, the Court specifically finds that the State was negligent in the placement of the stop signs and in the failure to place the rumble bars upon [Newberry Road] to give warning to any driver approaching the intersection.
>
> It is apparent from the evidence that [Ostergard] himself was negligent in failing to stop at the stop sign as he entered the intersection with Highway 30. [Ostergard] had a duty to obey all traffic signs and to drive so as to not endanger other drivers, his passenger, or himself.
>
> When comparing the two, the Court finds that the duty of the State . . . is greater than that of [Ostergard] in light of [the State's] overall obligation to protect all members of the traveling public by the way [it] conduct[s its] business. The negligence of the State . . . in this case, compared to the negligence of [Ostergard,] is greater. The Court assigns the negligence of the State . . . at 60 percent and the negligence of [Ostergard] at 40 percent.

The court found that Ostergard suffered damages of $204,817.98, and after reducing that amount by 40 percent, it entered judgment in favor of Ostergard in the amount of $122,890.78.

III. ASSIGNMENTS OF ERROR

In both cases, the State alleges that the district court erred in (1) failing to adequately perform its duty as a gatekeeper by (a) overruling the State's motion to determine admissibility of evidence concerning the expert opinion testimony offered against the State, (b) failing to make specific findings on the record as to why the court believed the experts' methodology

was reliably applied, and (c) admitting and relying on opinion testimony from Wilson and Daubert that was unreliable and lacked a sufficient engineering basis; (2) failing to apply the appropriate standard of care; (3) failing to find that the negligence of Ostergard was the proximate cause of the collision with Kirkwood; (4) finding that the State was liable based on evidence that (a) the overpass to the north of the intersection created a visual distraction, (b) there were no rumble strips, and (c) there was no stop line; and (5) failing to find that the State retained its sovereign immunity in (a) placing the stop ahead sign, (b) placing the "STOP AHEAD" pavement marking, and (c) constructing a viaduct that was visible from the intersection.

In case No. A-05-1226, the State additionally alleges that the district court erred in (1) failing to find that Podoll's negligence was the proximate cause of the collision with Robert Johnson, (2) finding that the State was liable based on evidence that Kirkwood sustained a loss of earning capacity as a result of the accident, and (3) overruling the State's motion to compel and motion to quash.

IV. STANDARD OF REVIEW

[1] An appellate court reviews the record de novo to determine whether a trial court has abdicated its gatekeeping function. *Fickle v. State*, 273 Neb. 990, 735 N.W.2d 754 (2007).

[2] Whether a witness is qualified as an expert is a preliminary question for the trial court. *State v. Tolliver*, 268 Neb. 920, 689 N.W.2d 567 (2004). A trial court is allowed discretion in determining whether a witness is qualified to testify as an expert, and unless the court's finding is clearly erroneous, such a determination will not be disturbed on appeal. *Id.*

[3-5] In proceedings where the Nebraska rules of evidence apply, the admission of evidence is controlled by rule and not by judicial discretion, except where judicial discretion is a factor involved in assessing admissibility. *Epp v. Lauby*, 271 Neb. 640, 715 N.W.2d 501 (2006). A trial court's ruling in receiving or excluding an expert's testimony which is otherwise relevant will be reversed only when there has been an abuse of discretion. *Id.*; *Schafersman v. Agland Coop*, 262 Neb. 215, 631

N.W.2d 862 (2001). An abuse of discretion occurs when a trial court's decision is based upon reasons that are untenable or unreasonable or if its action is clearly against justice or conscience, reason, and evidence. *Epp v. Lauby, supra*.

[6] A district court's findings of fact in a proceeding under the State Tort Claims Act will not be set aside unless such findings are clearly erroneous. *Fickle v. State, supra*.

[7] Whether the allegations made by a plaintiff constitute a claim under the State Tort Claims Act or whether the allegations set forth a claim that is precluded by the exemptions set forth in the act are questions of law. *Fickle v. State, supra*.

[8] The question whether a legal duty exists for actionable negligence is a question of law dependent on the facts in a particular situation. *Id.*

[9,10] The district court's interpretation of the Manual presents a question of law. *Tadros v. City of Omaha*, 269 Neb. 528, 694 N.W.2d 180 (2005). When reviewing questions of law, an appellate court has an obligation to resolve the questions independently of the conclusion reached by the trial court. *Id.*

V. ANALYSIS

1. Court's Performance of Duty as Gatekeeper

The State argues that the district court failed to adequately perform its duty as a gatekeeper by overruling the State's motion for determination of the admissibility of evidence in each case, failing to make specific findings on the record as to why the court believed the experts' methodology was reliably applied, and admitting and relying on opinion testimony from Wilson and Daubert that was unreliable and lacked a sufficient engineering basis. In its brief on appeal, the State argues that the court erred in admitting testimony from Wilson and from Daubert—who did not know the location of the right-side stop sign and merely relied on Wilson's assessment that it was located too far to the right—because such testimony was based on incorrect assumptions of fact in that Wilson did not reliably apply the correct provision of the Manual and in that Wilson's interpretation of various provisions of the Manual conflicted with the plain language of the Manual. The State asserts that the district court "made no finding on the reliability factors it

relied on in overruling the State's Motion." Brief for appellant in case No. A-05-1226 at 26.

In case No. A-05-1226, the State filed on June 13, 2005, a motion for determination of the admissibility of evidence, requesting that the district court determine, as a preliminary matter, that certain testimony of Kirkwood Appellees' expert witnesses was inadmissible under Neb. Rev. Stat. § 27-702 (Reissue 1995) and *Schafersman v. Agland Coop, supra*. On June 22, the district court overruled the motion, stating, "The Court finds, despite its comments earlier to the contrary, that the parties will simply call their witnesses and lay the foundation necessary for their opinions to be given. The Court sees no need to conduct a separate hearing prior to the introduction of evidence."

In case No. A-06-630, on September 8, 2005, the State filed a motion for determination of the admissibility of evidence, requesting the court to determine that certain testimony of Wilson, Daubert, and other witnesses was inadmissible. On January 17, 2006, the court overruled the motion without explanation. On January 31, the day trial commenced, the State filed a second motion for determination of the admissibility of evidence, seeking a determination that the anticipated testimonies of Wilson and Daubert were inadmissible. The State alleged that the opinions expressed by Wilson in the excerpts of his deposition that the State attached to its motion misrepresented the standard of care in traffic engineering. Specifically, the State alleged Wilson had testified that figure 2-2 of the Manual depicted the required signing practices for a wide-throat intersection, based on section 2A-21 of the Manual, which it alleged Wilson believed provided an industry standard by use of the words "'standard positions for a number of typical signs are illustrated in figures 2-1 to 2-4.'" The State attached an affidavit of Waddle, who stated therein that the Manual is periodically updated with "Errata Notifications" for correction of errors and omissions. Waddle attached to his affidavit a copy of a 1992 "errata sheet" for the Manual that he obtained from the Federal Highway Administration which showed the following correction: "**Page 2A-8, Section 2A-21, Standardization of Location.** Modify last paragraph to read, 'Typical placement

for a number of signs is illustrated in Figures 2-1 to 2-4.'" The State discussed the motion at the beginning of trial, and the court stated that it would take the motion under advisement because the court had not had a chance to look at it.

[11,12] When a court is faced with a decision regarding the admissibility of expert opinion evidence, the trial judge must determine at the outset, in accordance with Neb. Evid. R. 702, whether the expert is proposing to testify to (1) scientific, technical, or other specialized knowledge that (2) will assist the trier of fact to understand or determine a fact in issue. *Fickle v. State*, 273 Neb. 990, 735 N.W.2d 754 (2007); *Schafersman v. Agland Coop*, 262 Neb. 215, 631 N.W.2d 862 (2001). This entails a preliminary assessment to determine whether the reasoning or methodology underlying the testimony is valid and whether that reasoning or methodology properly can be applied to the facts in issue. *Id.* An expert's opinion is ordinarily admissible under rule 702 if the witness (1) qualifies as an expert, (2) has an opinion that will assist the trier of fact, (3) states his or her opinion, and (4) is prepared to disclose the basis of that opinion on cross-examination. *State v. Gutierrez*, 272 Neb. 995, 726 N.W.2d 542 (2007).

The Nebraska Supreme Court held in *Schafersman v. Agland Coop, supra*, that when the opinion involves scientific or specialized knowledge, appellate courts will apply the principles of *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 113 S. Ct. 2786, 125 L. Ed. 2d 469 (1993) (*Daubert*/*Schafersman*). See *State v. Gutierrez, supra*. Under the *Daubert*/*Schafersman* jurisprudence, the trial court acts as a gatekeeper to ensure the evidentiary relevance and reliability of an expert's opinion. This gatekeeping function entails a preliminary assessment whether the reasoning or methodology underlying the testimony is valid and whether that reasoning or methodology properly can be applied to the facts in issue. *State v. Gutierrez, supra*.

[13,14] An appellate court reviews the record de novo to determine whether a trial court has abdicated its gatekeeping function. *Fickle v. State, supra*. A trial court may not abdicate its gatekeeping duty under *Daubert*/*Schafersman* in a bench trial, but the court is afforded more flexibility in performing

this function. *Fickle v. State, supra.* A trial court adequately demonstrates that it has performed its gatekeeping duty in determining the reliability of expert testimony when the record shows (1) the court's conclusion whether the expert's opinion is admissible and (2) the reasoning the court used to reach that conclusion, specifically noting the factors bearing on reliability that the court relied on in reaching its determination. *Id.* We note that a trial court is not required to always hold a hearing prior to qualifying an expert pursuant to *Daubert/Schafersman*. See *State v. King*, 269 Neb. 326, 693 N.W.2d 250 (2005). Like in *Fickle v. State, supra*, the district court here did not make any express findings; rather, it essentially concluded that the evidence was admissible but left open the opportunity for parties to object to such testimony at trial.

The record shows that during Wilson's testimony on direct examination, Wilson stated that he had opinions as to whether the DOR complied with the Manual in developing the intersection, and when counsel for Kirkwood Appellees asked what those opinions were, the State objected, stating:

> I'll object at this point on the basis of Rule 702. [The question] calls for speculation, it calls for novel theories by this witness that have not been peer reviewed, . . . his method has not been reliably applied and . . . there has not been sufficient evidence as to what the standard of care is in the first place to support these conclusions.

The court sustained the objection. The court stated that it needed to know the underlying scientific principles upon which Wilson relied to make the determination that the State did not properly rely on the Manual. Wilson then testified that the basic requirements of traffic control devices are that they fulfill a need, command attention, be clearly recognized, convey a clear and simple meaning, and provide adequate time for a response. Wilson testified:

> [S]cientific research, research associated with message, visual acuity, research associated with motorists' comprehension of traffic control devices, motorists' recognition, eye movements, human factors are all fundamental principles that go into the Manual . . . so that research and the analysis of that research, the decisions made on that

> research become the founding basis for the Manual . . . and how that information is put there.

Shortly thereafter, the record shows the following colloquy:

> [Counsel for Kirkwood Appellees:] Let's take an example. I'm going to ask you to look within [the Manual]. Would you look at Section 2C?
>
> THE COURT: No. We don't — we don't need any examples. For the purposes of complying with the Nebraska Supreme Court's decision in Shafersman relying on Daubert . . . , he's qualified to give an opinion.
>
> [Counsel for Kirkwood Appellees:] Thank you very much, Your Honor.
>
> . . . Mr. Wilson, what conclusions did you draw following your study and analysis of the . . . intersection regarding whether or not the [DOR] had complied with this manual —
>
> . . . .
>
> [Counsel for the State:] . . . I'll renew the Rule 702 Daubert/Schafersman objection, Your Honor. Particularly as to the unidentified research.
>
> THE COURT: Overruled.

The State did not make a similar objection over the nearly 100 ensuing pages of testimony by Wilson, which testimony included his opinions.

In its judgment, the court stated that the engineers who testified "were clearly qualified to render the opinions they provided based on their extensive education," that "their opinions were based on scientifically valid and reliable considerations," and that the testimony "was clearly more probative than prejudicial." The court further stated that it found Wilson's testimony to be "entirely credible" and found Wilson to be "extremely well qualified and possessing what is clearly a passion for the safety of the traveling public." The court stated, "Further, his testimony was logical, clear, and pointed and coincided with the expectations contained in the [Manual]."

[15] On appeal, the State does not challenge Wilson's qualifications as an expert. Nor does the State challenge the scientific validity and reliability of the Manual, upon which Wilson based his opinions. Rather, the State's point of contention centers on

Wilson's interpretation of provisions of the Manual. For that reason, we conclude that no *Daubert* analysis was necessary. See, e.g., *Perry Lumber Co. v. Durable Servs.*, 271 Neb. 303, 710 N.W.2d 854 (2006) (concluding that no *Daubert* analysis of methodology was necessary where party asserting error did not challenge scientific validity and reliability of methodology set forth in publication providing guidelines for scientific method of fire investigation). The State's arguments would more appropriately be characterized as an attack on the amount of weight that should be accorded to Wilson's opinions, rather than on the admissibility of such opinions. And determining the weight that should be given expert testimony is uniquely the province of the fact finder. *Staley v. City of Omaha*, 271 Neb. 543, 713 N.W.2d 457 (2006). We conclude that the district court did not abuse its discretion in admitting Wilson's or Daubert's testimony as expert testimony.

2. Liability of State

[16] In order to recover in a negligence action brought under the State Tort Claims Act, a plaintiff must show a legal duty owed by the defendant to the plaintiff, a breach of such duty, causation, and damages. *Fickle v. State*, 273 Neb. 990, 735 N.W.2d 754 (2007).

(a) Duty

[17,18] The threshold issue in any negligence action is whether the defendant owes a legal duty to the plaintiff. *Id*. The question whether a legal duty exists for actionable negligence is a question of law dependent on the facts in a particular situation. *Id.* Concerning highways in general, the State has a duty to use reasonable and ordinary care in the construction, maintenance, and repair of its highways so that they will be reasonably safe for the traveler using them while exercising reasonable and ordinary care and prudence. *Id.* The State is not an insurer of the safety of travelers on its roads and highways. See *Woollen v. State*, 256 Neb. 865, 593 N.W.2d 729 (1999).

The State argues that the district court erred in failing to determine the appropriate standard of care because the court "failed to correctly apply the terms 'Shall,' 'Should,'

and 'May.'" Brief for appellant in case No. A-05-1226 at 39. It appears that the State's line of reasoning is that if it did not violate a mandatory provision of the Manual, it did not breach its duty of care.

[19] The first issue we consider is whether the Manual provides the sole duty of care. The Nebraska Supreme Court has stated that the State's failure to comply with the Manual is evidence of negligence, i.e., breach of duty. See *Maresh v. State*, 241 Neb. 496, 489 N.W.2d 298 (1992). Our state Supreme Court has also stated that advisory safety standards may represent a consensus of what a reasonable person in a particular industry would do, and therefore may be helpful to the trier of fact in deciding whether the standard of care has been met. *Norman v. Ogallala Pub. Sch. Dist.*, 259 Neb. 184, 609 N.W.2d 338 (2000) (reasoning that failure to follow "should" recommendation contained in safety standards may be considered as evidence of negligence). We conclude that compliance with the mandatory provisions of the Manual is not all that is needed for the State to meet its duty and that the State is still bound to exercise ordinary care in selecting the appropriate traffic control device for the circumstances.

(b) Breach

In addressing whether the State was negligent, we must determine whether the measures taken by the State were adequate under the provisions of the Manual and whether the State breached its general duty of reasonable and ordinary care.

(i) Stop Ahead Sign

[20] The State installed a stop ahead sign 1,500 feet from the intersection. Wilson testified that the sign was three times farther than it should have been. Daubert's testimony seemed to establish that the sign was appropriately placed, and Pline testified that the placement was "normal." In a bench trial of a law action, the court, as the trier of fact, is the sole judge of the credibility of the witnesses and the weight to be given their testimony. *Fickle v. State*, 273 Neb. 990, 735 N.W.2d 754 (2007). However, the district court seemed to base its decision on the terms of the Manual, which we review independently of

the district court's interpretation. See *Tadros v. City of Omaha*, 269 Neb. 528, 694 N.W.2d 180 (2005).

The district court determined that the State was negligent in failing to place the stop ahead sign within 500 feet of the intersection. The court stated that the Manual "sets a standard for placement of warning signs, such as the 'stop ahead' sign in this case," that "[o]n a roadway with a 55 miles per hour speed limit, [the sign] should be 450 feet from the actual stop condition," and that "[i]n the instant case, the warning sign was more than . . . 1000 feet farther away from the intersection than the [Manual] provides." However, the Manual only suggested that the sign be placed at least 450 feet away from the stop condition. It did not require or advise placement at 450 feet. Because the court's statements show that its finding was based on an incorrect belief that the Manual called for placement of the sign 450 feet in advance of the intersection, we conclude the court's factual finding was clearly erroneous.

(ii) Stop Line

The State did not use a stop line at the intersection. Section 3B-20 of the Manual, entitled "Pavement Word and Symbol Markings," provides: "The word 'STOP' shall not be used on the pavement unless accompanied by a stop line . . . and STOP sign . . . ."

The expert testimony on this issue conflicted. Wilson pointed out that in the Manual's figure 2-2, the illustration of a wide-throat intersection showed a stop line, and the district court recognized the same in its judgment; but we note that four of the six illustrations comprised by figure 2-2—which is intended to show "[t]ypical locations for stop signs and yield signs"—depicted a stop line, and only one illustration included the word "STOP" on the pavement. The court found the State negligent in failing to place a stop line at the intersection based on the above-quoted language of section 3B-20 of the Manual. Given that even Pline testified this issue was "subject to interpretation," we conclude the court's factual finding was not clearly erroneous.

(iii) Stop Signs

The State placed two stop signs at the intersection for the benefit of a northbound traveler on the south leg of Newberry Road. The court made no factual findings as to the sign on the left, which was intended to be a supplemental device. As to the sign on the right, the court found that the State breached its duty, stating in its judgment, "This placement does not comply with the [Manual] and the standard of placement of stop signs laterally from the edge of the highway at 12 feet."

Neither the State nor any of the appellees presented evidence of the right-hand sign's distance from the edge of Newberry Road. In looking at pictures of the sign, it does appear to be placed farther to the right than one would expect. However, the Manual does not require placement 12 feet from the edge of the road. Rather, the Manual provides that placement *should not be closer than* 12 feet from the edge. In its judgment, the court cites to an illustration of a wide-throat intersection contained in the Manual which shows a stop sign 12 feet from the edge of the road. But again, the illustration is of a "[t]ypical" location.

We are troubled by the court's dismissal of the evidence regarding the cone of vision. The court stated:

> Much was made of the "cone of vision" as set out in [an exhibit containing diagrams and photographs of the intersection and a driver's field of view]. Such evidence was of some interest. However, nothing in regard to the "cone of vision" replaces the responsibility of the State . . . to comply with the [Manual] in regard to the placement of signs. Further, . . . Pline testified that at higher speeds the focus of a driver is narrowed and extended farther and farther ahead. Therefore, the Court finds such evidence is not persuasive nor ultimately helpful to the Court as the trier of fact.

With respect to placement of a traffic control device, section 1A-2 of the Manual states in part:

> Placement of the device should assure that it is within the *cone of vision* of the viewer so that it will command attention; that it is positioned with respect to the point, object, or situation to which it applies to aid in conveying

> the proper meaning; and that its location, combined with suitable legibility, is such that a driver traveling at normal speed has adequate time to make the proper response.

(Emphasis omitted.) (Emphasis supplied.)

An authoritative engineering textbook received in evidence at trial states, "The best vision occurs within a cone of 3°, clear vision within 10°, and satisfactory vision within 20°. Traffic signs and markings should fall within the cone of clear vision, since acuity for reading drops rapidly outside this limit." Wolfgang S. Homburger et al., Fundamentals of Traffic Engineering at 3-1 (15th ed. 2001). That textbook further provides, "Laterally, signs should be placed within the driver's cone of vision, but not so close that they constitute a hazard to an errant vehicle." *Id.* at 16-4. However, whether the stop sign on the right was in a driver's cone of vision was disputed—Wilson testified that it was not, and others, including Pline, testified that it was.

Our interpretation of the Manual is that the stop sign needed to be placed within the driver's cone of vision, and not some specified distance from the edge of the road. To the extent the district court found that the Manual required placement from the edge of Newberry Road at 12 feet, such finding is clearly erroneous. We conclude, however, that the State breached its duty of ordinary care by placing the stop sign too far to the right of the road and outside of the cone of vision.

(iv) Rumble Strips

The State did not install rumble strips on the south leg of Newberry Road as shown on the DOR's signing plan. The strips were to be placed approximately 100 feet before the stop ahead sign. (The district court incorrectly stated that the rumble strips were to bracket the stop ahead sign.) The installation of rumble strips is not covered by the Manual, but the court found that the State breached its duty by failing to place the rumble strips as shown on its plan. We cannot say that this factual finding by the court was clearly erroneous.

(c) Causation

Above we concluded that the district court's findings that the State breached its duty in not placing a stop line at the

intersection, in placing the right-hand stop sign too far to the right, and in not placing rumble strips before the stop ahead sign were not clearly wrong. We now consider whether the district court clearly erred in finding that the State's breach of duty was a proximate cause of each of the accidents.

[21-24] The question of proximate cause, in the face of conflicting evidence, is ordinarily one for the trier of fact, and the court's determination will not be set aside unless clearly wrong. *Staley v. City of Omaha*, 271 Neb. 543, 713 N.W.2d 457 (2006). A proximate cause is a cause that produces a result in a natural and continuous sequence, and without which the result would not have occurred. *Fickle v. State*, 273 Neb. 990, 735 N.W.2d 754 (2007). To establish proximate cause, there are three basic requirements: (1) The negligence must be such that without it, the injury would not have occurred, commonly known as the "but for" rule; (2) the injury must be the natural and probable result of the negligence; and (3) there can be no efficient intervening cause. See *Malolepszy v. State*, 273 Neb. 313, 729 N.W.2d 669 (2007). An efficient intervening cause is new and independent conduct of a third person, which itself is a proximate cause of the injury in question and breaks the causal connection between the original conduct and the injury. *Id.* The causal connection is severed when (1) the negligent actions of a third party intervene, (2) the third party had full control of the situation, (3) the third party's negligence could not have been anticipated by the defendant, and (4) the third party's negligence directly resulted in injury to the plaintiff. *Id.*

[25,26] The State argues that the respective negligence of Ostergard and Podoll proximately caused the accidents because those drivers did not obey the traffic control devices and did not maintain a proper lookout. Certainly, a motorist has the duty to look both to the right and to the left and to maintain a proper lookout for the motorist's safety and that of others. *Id.* And Neb. Rev. Stat. § 60-6,119(1) (Reissue 2004) requires a driver to obey any traffic control devices. However, § 60-6,119(2) provides, "No provision of the rules for which traffic control devices are required shall be enforced against an alleged violator if at the time and place of the alleged violation an official device is not in proper position and sufficiently legible to be

seen by a reasonably observant person." We note that neither Ostergard nor Podoll received traffic tickets as a result of the accidents for disobeying the stop signs. Several witnesses testified that the right-hand stop sign was too far away or was not readily visible. Wilson testified that the supplemental stop sign, located to the northbound drivers' left and in the median, was intended for a vehicle turning left and that the stop sign on the right was the "primary needed traffic control" for a "through motorist."

The State also argues that Ostergard's and Podoll's negligence was an efficient intervening cause. The State contends that the facts of the instant cases are indistinguishable from the facts of *Zeller v. County of Howard*, 227 Neb. 667, 419 N.W.2d 654 (1988), and *Gerlach v. State*, 9 Neb. App. 806, 623 N.W.2d 1 (2000). We disagree.

In *Zeller*, a truck was struck while driving at a low rate of speed through an intersection obstructed from view by a knoll. A stop sign at which the truck would have been obligated to stop had been knocked down, and the passenger of the truck sued the county for failing to replace the sign. The Nebraska Supreme Court held that the driver of the truck failed to take appropriate measures to avoid the collision and unreasonably disregarded the obvious danger of the intersection and that thus, the driver's conduct was an efficient intervening cause of the collision because his behavior was unforeseeable to the county.

In *Gerlach*, a case that was appealed to this court following the sustaining of the State's motion for summary judgment, we concluded that the State was not bound to anticipate that a driver would negligently attempt to navigate a left-hand turn across oncoming traffic without yielding or that said driver would fail to see an oncoming vehicle in time to avoid a collision. Thus, the driver's conduct was an efficient intervening cause.

In the instant cases, however, the intersection was not obstructed from view such that a driver would need to slow or stop before proceeding through the intersection. Unfortunately, the roadbed of Highway 30 was not visible from a distance due to its elevation's being lower than that of the approach of the

south leg of Newberry Road, so drivers may not immediately have been aware where the roads intersected. The placement of the right-hand stop sign too far away from the road exacerbated the problem, and we cannot say that it was unforeseeable to the State that a reasonably attentive driver would fail to see it. We recognize that the State installed a supplemental stop sign in the island to the left and undertook other measures to warn of an upcoming stop condition. However, according to the expert testimony presented by Kirkwood Appellees and by Ostergard, a driver would look for, and reasonably expect to see, a stop sign a short distance from the right side of the road. The right-hand sign in this case was not appropriately located. We cannot say that the district court's factual findings on the issue of causation were clearly erroneous.

The dissent considers Robert Johnson's actions in its conclusion that the State's signage at the intersection was not the proximate cause of the Johnson-Podoll accident. The State alleged in its answer that Robert Johnson's damages were proximately caused by his negligence, which included failing to keep a proper lookout and failing to yield the right-of-way to Podoll. However, the State apparently abandoned this position at trial; the most significant evidence at trial concerning Robert Johnson's actions at the time of the accident came from the description of the accident contained in the motor vehicle accident report and brief testimony admitted over the State's objection by a witness summarizing what Podoll had described. As a general rule, an appellate court disposes of a case on the theory presented in the district court. *Wise v. Omaha Public Schools*, 271 Neb. 635, 714 N.W.2d 19 (2006). Moreover, on appeal, the State does not assign or argue that the district court erred in failing to find that Robert Johnson was contributorily negligent. In the absence of plain error, an appellate court considers only claimed errors which are both assigned and discussed. *In re Trust of Rosenberg*, 273 Neb. 59, 727 N.W.2d 430 (2007). Because (1) any negligent conduct by Robert Johnson was not a theory of defense pursued by the State at trial, (2) the State does not assign error regarding the matter, and (3) we find no plain error, we decline to consider Robert Johnson's conduct on appeal.

3. Sovereign Immunity

The State assigns that the district court erred in failing to find that the State retained its sovereign immunity in placing the stop ahead sign and the "STOP AHEAD" pavement marking and in constructing a viaduct that was visible from the intersection. The State's argument on this issue is that it is immune from liability under § 81-8,219(11) because the visibility of Highway 30 was a condition that conformed to the State's plans for construction and because the stop ahead sign and pavement marking were installed as shown on properly approved plans and designs.

First, as to the placement of the stop ahead sign, above we concluded that the district court's factual finding was clearly erroneous and that the State did not breach its duty in installing this device. Second, the district court did not find that the State breached a duty with respect to the pavement marking; in fact, the court made no findings in regard to the pavement marking. Finally, the district court specifically found that the State had not waived its sovereign immunity in regard to the design of roadways, overpasses, or bridges, and the court stated that it did "not question in any way the design aspects of the intersection" or "the determination as to which traffic control devices were chosen for the intersection." It stated that each of those issues "clearly falls within the discretionary function exception to the tort claims act." This assignment of error lacks merit.

4. Lost Earning Capacity

The State argues that the evidence was insufficient to establish that Kirkwood suffered a loss of earning capacity as a result of the accident. With regard to lost earning capacity, the district court stated that it accepted the deposition testimony of David W. Utley and Dr. Jerome Sherman, and the court entered judgment for loss of earning capacity in the amount of $442,219. The court stated that Kirkwood clearly "suffered significant injuries that resulted in his present emotional and cognitive difficulties" and that "[t]his has affected his ability to work."

The thrust of the State's argument on this issue is that Utley incorrectly assumed that all of Kirkwood's impairments were a result of the collision and that Sherman's opinions were based

on Utley's opinion. Utley testified in his deposition, "It's my understanding that all of the . . . restrictions and all of the medical diagnoses that I'm aware of are as a result of the automobile collision." He based that conclusion "[o]n [his] review of the overall records and . . . Kirkwood's report of what his work activities were prior to the . . . motor vehicle accident." Utley did not believe that he had been provided any information as to a workplace accident sustained by Kirkwood in October or November 2003. In performing his analysis of Kirkwood, Utley did not make any attempt to distinguish restrictions that may have arisen from accident injuries from restrictions that may have arisen from some other cause or injury sustained at a different time.

The evidence shows that Kirkwood's family doctor released him to return to work without restrictions and that Kirkwood returned to work in January 2003. Kirkwood testified that his back had bothered him and that in November 2003, he "was doing some pretty strenuous work and it bothered [him] pretty bad again and put [him] out of work for a little while." More specifically, Kirkwood was twisting and bending in a narrow space as he removed an assembly of an alternator weighing approximately 200 pounds. Immediately after that incident, Kirkwood was off work for 2 months. He testified that he "opted to not do that job anymore and try to find something else just a little bit more suitable" and that "unfortunately, [in] North Platte, that's not easy to do." He testified that he voluntarily resigned from his railroad employment in October 2004, primarily due to problems associated with the back injury. He was unemployed at the time of trial. A psychiatrist testified that Kirkwood told him that Kirkwood returned to work following the accident and electively decided to leave in 2004 because he did not have much seniority with the railroad and "felt it just really wasn't . . . worthwhile."

Dr. Estela Bogaert-Martinez testified:

> Kirkwood is going to have a very difficult time regaining employment because of the damage to his motivational system, to his frontal lobes, which [are] the boss of the brain that allows him to continue to problem solve, to follow through, to engage in goal-oriented activity. So unless he gets a very structured, very repetitive type of job,

> anything that requires a lot of novel thinking and problem solving is going to be very hard for him.

In Utley's loss of earning capacity analysis, he stated that Kirkwood had a mild limitation for understanding and remembering detailed, complex, and multistep instructions; a moderate limitation for being able to maintain attention and concentration for extended periods of time; and a moderate limitation for working at a consistent pace without an unreasonable number or length of rest periods. Utley concluded that Kirkwood was employable but had sustained a loss of earning capacity of approximately 45 percent. Sherman testified the net economic loss for Kirkwood, discounted at 2.45 percent, would be $442,119.

[27,28] Damages for permanent impairment of future earning capacity may not be based on speculation, probabilities, or uncertainty, but must be shown by competent evidence that such damages are reasonably certain as the proximate result of the pleaded injury. *Anderson/Couvillon v. Nebraska Dept. of Soc. Servs.*, 253 Neb. 813, 572 N.W.2d 362 (1998). The determination of the amount of damages is a matter which is one solely for the fact finder, whose action in this respect will not be disturbed on appeal if it is supported by evidence and bears a reasonable relationship to the elements of damages proved. See *Woollen v. State*, 256 Neb. 865, 593 N.W.2d 729 (1999). The evidence demonstrates that Kirkwood returned to work following the accident, that he later injured his back while working, and that he resigned due in large part to the injury sustained at work. Even though Utley's analysis may have been flawed because he was of the impression that all of Kirkwood's restrictions and medical diagnoses were caused by the collision, Utley opined that Kirkwood was employable. The court specifically stated that Kirkwood's emotional and cognitive difficulties—not any physical restrictions—would affect his ability to work. We conclude that competent evidence supported the district court's determination of damages based on Kirkwood's lost earning capacity.

5. Motion to Compel and Motion to Quash

In case No. A-05-1226, the State filed various pretrial motions relating to the experts of Kirkwood Appellees, and the

State argues that the district court erred in overruling its motion to compel and its motion to quash.

(a) Motion to Compel

On February 22, 2005, the State filed a motion to compel. According to the motion, on June 3, 2004, the State served interrogatories and requests for production on Kirkwood Appellees, but the State had not been provided with answers or documents which could be deemed to constitute fully responsive answers to certain interrogatories and requests. The State sought responses to interrogatory No. 8 and request for production No. 1.

Interrogatory No. 8 requested information about each expert witness Kirkwood Appellees had consulted or intended to call at trial. Request for production No. 1 asked for medical records of any Kirkwood Appellees which related to their action against the State and the expenses which Kirkwood Appellees sought to recover.

On March 9, 2005, the court entered its order overruling the motion, stating:

> The Court specifically notes that the treating physicians who are "experts" for the purposes of giving an instruction on expert witnesses are not experts retained in this case to testify on behalf of [Kirkwood Appellees], but were merely treating physicians. They are, therefore, fact witnesses who may be rendering opinions, but they were not retained to do so. See, *Tzystuck v. Chicago Transit Authority*, [124 Ill. 2d 226, 529 N.E.2d 525, 124 Ill. Dec. 544 (1988)]; *Ryder Truck Rental, Inc. v. Perez*, [715 So. 2d 289 (Fla. App. 1998)]; and *Schreiber v. Kiser*, [989 P.2d 720 (1999)].

The State argues that this was an abuse of discretion because the treating physicians were expert witnesses rather than fact witnesses, citing *Smith v. Paiz*, 84 P.3d 1272 (Wyo. 2004) (status of treating physicians as fact or expert witnesses depends upon content of testimony).

The State asserts that Kirkwood Appellees offered medical opinion testimony from doctors Jennifer Burns, David Hurst, Mark Young, and Bogaert-Martinez at trial and that those doctors were not identified prior to trial in a responsive answer

to interrogatory No. 8, but that they were listed on a document entitled "'Plaintiff's Designation of Expert Witnesses'" which was served on the State on December 8, 2004, identifying them as "'treating physician[s] who may be called to testify in this matter.'" Brief for appellant in case No. A-05-1226 at 44. The State argues that "[t]he 'Plaintiff's Designation of Expert Witnesses' was not in the form of an Answer to Interrogatory, was not signed under oath, and did not state the substance of the facts and opinions to which the doctors were expected to testify." *Id.*

[29-31] Certainly, a litigant has the right to have interrogatories answered and the adversary has a continuing duty to supplement prior responses. See *Norquay v. Union Pacific Railroad*, 225 Neb. 527, 407 N.W.2d 146 (1987). When a party has failed to respond, or respond properly, to an interrogatory authorized by Neb. Ct. R. of Discovery 26(b)(4)(A)(i) (rev. 2000), or has failed to make supplemental responses required under rule 26(e)(1)(B), and such noncomplying party calls an expert witness to offer testimony within the scope of the interrogatory in question, the adverse party must object to a previously unidentified expert witness' testifying in general or object to testimony of an expert witness testifying about a previously undisclosed but discoverable matter sought to be disclosed by the interrogatory in question. *Norquay v. Union Pacific Railroad, supra*. If the court, over objection, allows such expert witness to testify, notwithstanding nondisclosure before trial, when appropriate the adverse party must move to strike the expert witness' testimony, request a continuance to give the surprised adversary an opportunity to investigate further and secure rebuttal evidence, or, under certain circumstances, move for a mistrial. *Id.*

At trial, the State objected to the offer of Burns' deposition, but the only reason for the objection was due to the State's cross-examination's being cut short because not enough time had been allotted. The State also objected to medical records from Burns, but only "to any use of them for opinions or diagnoses which are clearly excepted from the business records rule." During Hurst's testimony, he was asked for conclusions as to Kirkwood's condition, and the State objected "on basis

of [rule] 702, opinions not previously disclosed and the basis of surprise." Counsel for Kirkwood Appellees responded, "We talked about it at the deposition." The court overruled the objection. During the testimony of Young and Bogaert-Martinez, the State objected to any "Rule 702 testimony" on the basis of surprise. However, the State never moved to strike the testimony or reports of the above doctors; nor did the State move for a continuance or for a mistrial. For those reasons, we reach the same conclusion as did the Nebraska Supreme Court in *Norquay v. Union Pacific Railroad*, 225 Neb. at 542, 407 N.W.2d at 156: "Whatever may have been an appropriate remedial measure . . . at trial we do not decide in the absence of a motion for a particular remedial measure in the trial court."

(b) Motion to Quash

On May 31, 2005, the State filed a motion to quash Kirkwood Appellees' fifth supplemental answers to the State's first interrogatories and Kirkwood Appellees' seventh supplemental answers to the State's first requests for production of documents. The State argued that Kirkwood Appellees failed to seasonably supplement their answers and that their fifth supplemental answers to interrogatories failed to comply with the requirements of Neb. Ct. R. of Discovery 33 (rev. 2000). The State asserted that it was prejudiced by (1) the disclosure on the eve of trial of five new expert witnesses, namely Bonnie Edwards, Gutschenritter, Carman, Daubert, and Joel Cotton; (2) Kirkwood Appellees' attempt on the eve of trial to transform the witnesses previously identified as "treating physicians," namely Young, Bogaert-Martinez, Burns, Hurst, Gary Connell, Cotton, and Eric Hartman, into expert witnesses; and (3) the disclosure of witnesses Ken Barnum and Bill Heimbuch, whose identities had not been disclosed in any previous discovery proceeding.

On June 20, 2005, the court held a hearing on the motion. The State argued that the interrogatory answers were not signed under oath and that the interrogatory answers disclosed a number of expert witnesses in May—only a month in advance of trial. Counsel for the State represented that a pretrial order required expert witnesses to be disclosed by either December 31, 2004, or January 31, 2005. The State contended that it was

not afforded any reasonable opportunity to discover what the experts were going to say and to prepare a counterargument and that Kirkwood Appellees had been "trying to morph" the doctors they disclosed as treating physicians into expert witnesses "so they can get them to offer opinions on causation, damages, prognoses, diagnoses, things of that nature." The court responded, "The sort of things doctors always tell us. This can't be a surprise that the doctors are going to say what caused the injury and how much it's going to affect their [sic] life. I mean, that's what doctors do." Kirkwood Appellees argued that the State had known about the medical witnesses and had, for months, received reports from the witnesses setting forth their opinions. Kirkwood Appellees' counsel claimed that the State had the vast majority of the reports in late February, when the State moved to continue the trial so that dozens of depositions could be taken, but that the State had only taken one or two depositions since that time.

On June 22, 2005, the court overruled the motion in a written order. The State argues that this was an abuse of discretion because the court had previously ordered that all of Kirkwood Appellees' experts were to be disclosed by December 1, 2004, and Kirkwood Appellees knew the identities of most of the experts months before they were disclosed in response to the State's interrogatories.

[32] We find no abuse of discretion by the district court for a number of reasons. First, we observe that Connell, Hartman, and Heimbuch did not provide any testimony at trial. Second, the State did not make any objections based on late disclosure to the testimony of Gutschenritter, Carman, or Barnum. Third, we already covered the State's objections at trial to testimony from Young, Bogaert-Martinez, Burns, Hurst, and Cotton on the basis of late disclosure, and noted that we could not provide relief when the State failed to move to strike, move for a continuance, or move for a mistrial. Fourth, the State objected to the offer of Cotton's deposition "on the lateness of the disclosure of the witness," but counsel for Kirkwood Appellees stated, "Just for the record . . . Cotton is an expert retained by the [State] and who did an examination of [Robert] Johnson." Surely, the State was aware of Cotton's findings and opinions.

Fifth, on the basis of surprise, the State objected during trial to a question asked of Edwards and to two exhibits she helped prepare, and the State also objected to the offer of Daubert's deposition "on the basis [that] the witness [Daubert] was not disclosed until about a month before trial as a potential expert." However, the State has failed to demonstrate any prejudice suffered as a result of the late disclosures. Although we do not condone the disclosing of experts after the deadline for such as imposed by the trial court, the control of discovery is generally a matter for judicial discretion. See *Gallner v. Gallner*, 257 Neb. 158, 595 N.W.2d 904 (1999). We find no abuse of discretion by the district court in denying the State's motion to quash.

VI. CONCLUSION

We conclude that the district court did not abdicate its gatekeeping function or abuse its discretion in admitting the expert testimony of Wilson and Daubert. We conclude that the court's factual findings that the State's negligence proximately caused the accidents were not clearly erroneous. The district court did not find that the State waived its sovereign immunity as alleged by the State. We conclude the evidence supports the award to Kirkwood based on lost earning capacity. Finally, we find no abuse of discretion by the court in denying the State's motion to compel and motion to quash. We therefore affirm the judgments of the district court in each case.

AFFIRMED.

SIEVERS, Judge, dissenting.

I find that I must respectfully dissent from the affirmance of the judgments entered by the trial court in these two cases which have been consolidated for purposes of opinion and disposition. My colleagues' opinion comprehensively discusses the facts and circumstances of both accidents, with one exception to be discussed later, as well as the pertinent testimony and exhibits concerning the signage at the intersection of Newberry Road and Highway 30 located at the east corporate limits of North Platte, Nebraska. The written word cannot begin to accurately portray what was visible to the two northbound drivers, and the significance of such, as they approached the

intersection. Nonetheless, let me begin by simply listing what the two northbound drivers passed by, and obviously ignored, as they blew through this protected intersection and collided with the Kirkwood and Johnson vehicles. All of such is powerfully depicted in the photographs of the signage at the intersection and its overall appearance. The northbound drivers would have seen the following had they been attentive:

- A diamond-shaped sign with a red octagon (for a stop sign) and a black arrow pointing forward, with a rectangular sign attached below saying "1500 FT."
- A large green-backgrounded sign with "JUNCTION" in white letters above a white diagram depicting an intersection of "4TH STREET" on the left and the U.S. highway symbol with the number 30 in black numbers both to the right and straight ahead north.
- The words "STOP AHEAD" in the middle of the northbound lane in large letters, within 100 feet of the beginning of the island; on the northbound driver's left, a solid yellow no-passing line on the pavement and a black-on-white sign, placed on the south end of the island, depicting an island; on the driver's right, a white-on-green sign indicating North Platte to the left and Gothenburg to the right, with distances; and large overhead street lamps on both sides of the road.
- On the northbound driver's left, an oversized stop sign, with two reddish-orange flags on top of it, located at the center of the nose of the island for left turns.
- On the northbound driver's right at the edge of the "wide throat" right turn configuration, another stop sign identical to the sign described above.

In the simplest terms, if all of the above could speak to the northbound driver, they would scream, "MAJOR INTERSECTION AHEAD! CROSS TRAFFIC! STOP!"

Therefore, even if the State could be found negligent in its signage of the intersection, the failure of the trial court to find that the obvious negligence of the two northbound drivers was an efficient intervening cause is clearly wrong. As such, reversal of the trial court's judgments against the State is required.

In the majority opinion at section V(2), "LIABILITY OF STATE," under subheading (b), "Breach," the majority discusses the four

specific aspects by which the trial court found the State was negligent with respect to signage at the intersection. These are (i) stop ahead sign, (ii) stop line, (iii) stop signs, and (iv) rumble strips. My colleagues have concluded that the trial court's findings of negligence with respect to two of the four—(i) stop ahead sign and (iii) stop signs—are clearly erroneous, and I agree with my colleagues. That said, I disagree with what I see as a factual finding by the majority with respect to (iii) stop signs, when the majority opinion says, "We conclude, however, that the State breached its duty of ordinary care by placing the [right-side] stop sign too far to the right of the road and outside of the cone of vision." The difficulty with that finding by my colleagues is that it fails to recognize the fundamental fact that the concept of a driver's cone of vision is a dynamic rather than a static measurement of what a driver could see and where he or she would be when he or she could see the stop sign on the right. I note that there is no dispute that the stop sign on the northbound driver's left was appropriately within the driver's 10-degree cone of vision.

As pointed out in the majority opinion, the testimony is that an object within the central 10 degrees of the driver's vision is within the driver's "'clear vision'" and thus is readily visible to the driver. However, what is inside of, or outside of, that 10-degree cone of vision for a driver looking forward depends upon how far away from the object the driver is. In short, the 10-degree cone of vision takes in more objects the farther the driver is away from the objects. Consequently, as the driver approaches a stop sign, it will be within his 10-degree cone of vision at some point and then will pass outside of the 10-degree cone of vision as the driver gets closer and closer to it, to the point that it is more than 10 degrees outside, then directly beside him, and then behind him as he passes it. The farther the object is to the left or right of the driver's cone of vision, the farther back from the object the driver will be for the object to be in his cone of vision. And, all of this assumes a driver is staring directly ahead, without moving his vision left or right, because if he shifts his vision, then the objects to the left or right of straight-ahead vision obviously can fall within the 10-degree cone of vision. For example, when a driver

directs his vision 15 degrees to the right, the 10-degree cone of clear vision obviously shifts 15 degrees to the right. In this case, an exhibit contains objective evidence through a series of photographs taken from a northbound vehicle as it approached the intersection—to depict what such a driver would see and where he would be on the roadway when objects such as the signs described above were in his 20-degree "satisfactory" cone of vision—again recognizing that even a slight shift to the left or right of the driver's vision has the effect of putting more objects within the cone of vision, and does so when the driver is closer to such objects. Superimposed on such photographs is a cone of vision as a shaded area, and through studying the exhibit, one can easily discern what exactly is in the cone of vision (of a driver staring straight ahead) and how far away from the intersection such an object is from the driver. The witness testifying about the exhibit acknowledged that drivers do not stare straight ahead but naturally shift their vision left and right of their driving path. And, in this respect, I would submit that reasonably attentive drivers do not drive with their vision fixed straight ahead. In other words, the attentive driver shifts vision to the left and right, which increases what he sees as well as affecting when such objects are seen as the driver proceeds forward on the roadway. The aforementioned exhibit reveals that all of the things listed at the outset, which tell the driver to stop, were readily visible to an attentive driver.

Therefore, of the four grounds upon which the trial court found the State negligent, my colleagues find that two of those findings are clearly erroneous, and such fact obviously impacts the trial court's finding that the State's negligence was a proximate cause of the accident, as well as adversely impacting my colleagues' affirmance of that finding. Additionally, it is appropriate to point out at this juncture and emphasize that both stop signs were overly large stop signs, being 36 by 36 inches, with a cross dimension 20 percent larger than that of the typical 30- by 30-inch stop sign. And, both stop signs had two reddish-orange flags affixed to the top of them, obviously to call the motorists' attention to their presence.

With respect to the trial court's finding of negligence on the part of the State by failing to install rumble strips, my colleagues

affirm such finding as not clearly erroneous, noting that the installation of such is not covered by the Manual but was in the State's original signing plan. When rumble strips are not required by the Manual, the fact that such were not installed by the State is an insufficient basis upon which to premise a finding of proximate cause and lack of intervening cause—given the other warnings listed above that the northbound motorist had to stop at this intersection.

The majority opinion discusses the fundamental principles of proximate cause and efficient intervening cause with the appropriate authority cited, which I will not repeat.

The Kirkwood-Ostergard collision occurred at night, when presumably the northbound Ostergard vehicle and the westbound Kirkwood vehicle had their headlights illuminated. There is no evidence that Ostergard ever responded in any way to the numerous things which would tell a reasonably attentive driver that he was approaching a major intersection at which he was required to stop. His passenger, whose testimony provided the only source of evidence as to what Ostergard did or did not do, testified that Ostergard did not slow down, stop, or look left or right. Ostergard himself had no memory of anything that happened after leaving a truckstop some distance away from the accident site. There is simply no evidence that he was reasonably attentive or exercised even a touch of reasonable care. There was no physical evidence to indicate that Ostergard braked. In summary, Ostergard was a northbound driver with a duty imposed by law to be reasonably attentive who went through all of the signs and indications warning of a stop ahead at a major intersection. Even if two out of the four grounds of negligence on the part of the State are upheld, when analyzing proximate cause, it is impossible for me to conclude, given the numerous warning signs and devices obviously ignored by Ostergard in breach of his duty to exercise reasonable care and be reasonably attentive, that the accident and injury would not have occurred but for the State's negligence; nor can I say that the accident and injury were the natural and probable result of the State's negligence in signage. Even if the State was negligent in signing the intersection, I cannot say that Ostergard was not an efficient intervening cause.

An efficient intervening cause is the new and independent conduct of a third person which itself is a proximate cause of the injury in question and breaks the causal connection between any negligence on the part of the State in signing the intersection and Kirkwood's injuries. In the instance of an efficient intervening cause, the causal connection is severed when the negligent actions of a third party intervene, and Ostergard was obviously negligent; the third party had full control of the situation, which Ostergard clearly did in that all he needed to do was see what was there to be seen and obey the traffic directions given by the traffic controls, signs, and devices; and the third party's negligence could not have been anticipated by the defendant, the State. With regard to the State's anticipation, the State was entitled to assume that Ostergard would act with reasonable care, and in my view, the State could not anticipate that a driver acting with reasonable care and attention would ignore the abundant signs of an approaching major intersection at which he had to stop before entering that intersection.

Finally, the fourth requirement with respect to efficient intervening cause is that the third party's negligence directly resulted in injury to the plaintiff. Obviously, it is the act of Ostergard in entering a protected intersection that directly caused the injuries to Kirkwood. Accordingly, in summary, even upholding two of the factual findings of negligence on the part of the State, such negligence was not a proximate cause of Kirkwood's injuries, and Ostergard's negligence was an efficient intervening cause even if the State's negligence was a proximate cause. For these reasons, I would reverse the verdict in the amount of $1,640,791.28 in favor of Kirkwood.

My colleagues have also affirmed the trial court's verdict in favor of Ostergard in the amount of $122,890.78, thereby affirming the trial court's finding that the State was 60-percent negligent and Ostergard was 40-percent negligent. The trial judge's apportionment of such percentages is based on its finding that "the duty of the State . . . is greater than that of [Ostergard] in light of [its] overall obligation to protect all members of the traveling public by the way [it] conduct[s its] business." There is no citation of authority for the notion that the State has a greater duty to act with reasonable care

toward members of the traveling public, i.e., Kirkwood, than does Ostergard. Even ignoring this unfounded conclusion of law imposing a greater duty on the State than upon Ostergard, under the facts of this accident as laid out above, a finding that Ostergard's negligence was less than the State's negligence is not supported by the evidence and is clearly wrong. The State's negligence is passive and Ostergard's negligence is active, and in my view, the State's negligence—even assuming it was a proximate cause, a conclusion that I cannot reach—still could not be found to be greater than Ostergard's by a reasonable fact finder. Accordingly, I would reverse the judgment, in Ostergard's favor.

Turning to the Johnson-Podoll collision, my problems with an affirmance of the trial court's verdict in the amount of $1,458,975.82 for Robert Johnson and $300,000 for his wife, Mavis Johnson, are even more pronounced than in the Kirkwood-Ostergard collision. I say this because my colleagues apparently do not find significance in the nature of this accident. In this accident, the northbound driver, Podoll, ignored all of the same warning signs and traffic control devices as did Ostergard, but it is of major import that the Johnson vehicle turned left in front of the Podoll vehicle in ignorance of Robert Johnson's duty to yield the right of way to an oncoming vehicle which was obviously not slowing down, let alone stopping. See Neb. Rev. Stat. § 60-6,147 (Reissue 2004) ("[t]he driver of a vehicle who intends to turn to the left within an intersection . . . shall yield the right-of-way to any vehicle approaching from the opposite direction which is within the intersection or approaching so close as to constitute an immediate hazard").

Admittedly, Robert Johnson had a right to assume that the oncoming vehicle driven by Podoll would obey the two oversized stop signs which were facing Podoll and the backs of which would have been directly in front of Robert Johnson when he stopped for cross traffic on Highway 30. But, there is no evidence from Podoll that he slowed down, stopped, or braked; yet Robert Johnson blithely turned in front of a vehicle whose driver gave no apparent sign or indication of being aware of the fact that he was dutybound to stop. When I put the fact of Robert Johnson's left turn in front of the onrushing Podoll

vehicle into the calculus of proximate cause and efficient intervening cause, I can only conclude that even if the State was negligent in its signing of the intersection, such was not a proximate cause, and that even if it could be considered a proximate cause, Podoll's negligence (and he can be no less negligent than Ostergard) combined with the negligence of Robert Johnson constitute efficient intervening causes. My colleagues advance three reasons why the fact that Robert Johnson turned left in front of the Podoll vehicle is not properly part of the analysis of the accident. I acknowledge that the State, while pleading such fact as a proximate cause and as an efficient intervening cause, did not actually advance such argument in the trial court. Nonetheless, that Robert Johnson turned left in front of Podoll is an undisputed fact about how the accident occurred, which, in my view, neither a trial court nor an appellate court can ignore merely because defense counsel may not have grasped its significance.

For these reasons, I would reverse all of the judgments entered in these two cases against the State and remand the matter to the trial court with directions to enter judgments in favor of the State and against each of the plaintiffs.

Community Redevelopment Authority of the City of Hastings, Nebraska, a municipal corporation, and City of Hastings, Nebraska, a municipal corporation, appellees and cross-appellants, v. Patricia Gizinski, Adams County assessor, et al., appellants and cross-appellees.

745 N.W.2d 616

Filed March 4, 2008. No. A-06-075.

1. **Appeal and Error.** To be considered by an appellate court, an alleged error must be both specifically assigned and specifically argued in the brief of the party asserting the error.
2. ____. Although an appellate court ordinarily considers only those errors assigned and discussed in the briefs, the appellate court may, at its option, notice plain error.
3. **Jurisdiction: Appeal and Error.** Before reaching the legal issues presented for review, it is the power and duty of an appellate court to determine whether it has

jurisdiction over the matter before it, irrespective of whether the issue is raised by the parties.

4. ____: ____. When a lower court lacks the authority to exercise its subject matter jurisdiction to adjudicate the merits of a claim, issue, or question, an appellate court also lacks the power to determine the merits of the claim, issue, or question presented to the lower court.
5. **Taxation: Valuation.** A property owner's exclusive remedy for relief from overvaluation of property for tax purposes is by protest to the county board of equalization.
6. **Appeal and Error: Words and Phrases.** Plain error is error plainly evident from the record and of such a nature that to leave it uncorrected would result in damage to the integrity, reputation, or fairness of the judicial process.
7. **Mandamus: Words and Phrases.** Mandamus is a law action and is defined as an extraordinary remedy, not a writ of right, issued to compel the performance of a purely ministerial act or duty, imposed by law upon an inferior tribunal, corporation, board, or person, where (1) the relator has a clear right to the relief sought, (2) there is a corresponding clear duty existing on the part of the respondent to perform the act, and (3) there is no other plain and adequate remedy available in the ordinary course of law.
8. **Appeal and Error.** An appellate court will not consider an issue on appeal that was not presented to or passed upon by the trial court.

Appeal from the District Court for Adams County: STEPHEN ILLINGWORTH, Judge. Affirmed.

Charles A. Hamilton, Deputy Adams County Attorney, for appellants.

Robert M. Sullivan for appellees.

IRWIN, SIEVERS, and MOORE, Judges.

MOORE, Judge.

INTRODUCTION

Patricia Gizinski, the Adams County assessor; Julia Moeller, the Adams County treasurer; and Adams County, Nebraska (collectively the County), appeal from the declaratory judgment and writ of mandamus entered against them in favor of the Community Redevelopment Authority of the City of Hastings, Nebraska, and the City of Hastings (collectively the Authority) by the district court for Adams County. The district court entered a declaratory judgment, finding that the redevelopment project valuation for certain property should have been set at $32,500, and issued a writ of mandamus directing the

county assessor to transmit that value as of January 1, 2000, to the Authority and the county treasurer in accordance with Nebraska's Community Development Law, Neb. Rev. Stat. § 18-2101 et seq. (Reissue 1997 & Cum. Supp. 2004). The County appeals, and the Authority cross-appeals. For the reasons set forth herein, we affirm.

BACKGROUND

General Information.

We first set forth some general information in order to provide a context for the dispute in the present case. Neb. Const. art. VIII, § 12, provides in part:

> For the purpose of rehabilitating, acquiring, or redeveloping substandard and blighted property in a redevelopment project . . . any city or village of the state may . . . incur indebtedness, whether by bond, loans, notes, advance of money, or otherwise. . . . [S]uch cities or villages may also pledge for and apply to the payment of the principal, interest, and any premium on such indebtedness all taxes levied by all taxing bodies . . . on the assessed valuation of the property in the project area portion of a designated blighted and substandard area that is in excess of the assessed valuation of such property for the year prior to such rehabilitation, acquisition, or redevelopment.

In *State ex rel. Scoular Prop. v. Bemis*, 242 Neb. 659, 660-61, 496 N.W.2d 488, 489 (1993), the Nebraska Supreme Court discussed the implementation of that section of the Constitution:

> To implement that section of the Constitution, the Legislature enacted the Community Development Law, Neb. Rev. Stat. §§ 18-2101 et seq. (Reissue 1991). That Act provides in substance that upon approval of a redevelopment plan, the developer's cost of reconstruction and redevelopment of the specific property may be financed by the issuance of bonds by the particular city involved. Upon request, the county assessor is to transmit a redevelopment valuation of the property equal to the assessed valuation for the year immediately preceding the effective date of the redevelopment plan. Following the redevelopment, the developer agrees to pay taxes on the basis of the

> assessed valuation of the property resulting from the redevelopment, and the difference between the taxes which would have been paid on the pre-redevelopment valuation and the taxes paid on the post-redevelopment valuation, is paid into a special fund to be used to repay the principal and interest on the bonds so issued.

(Emphasis omitted.)

Specifically at issue in the present case is Neb. Rev. Stat. § 18-2148 (Reissue 1997), which defines the duties of the county assessor with respect to the valuation of redevelopment property:

> Commencing on the effective date of the provision outlined in section 18-2147, the county assessor, or county clerk where he or she is ex officio county assessor, of the county in which the redevelopment project is located, shall transmit to an authority and the county treasurer, upon request of the authority, the redevelopment project valuation and shall annually certify to the authority and the county treasurer the current valuation for assessment of taxable real property in the redevelopment project. The county assessor shall undertake, upon request of an authority, an investigation, examination, and inspection of the taxable real property in the redevelopment project and shall reaffirm or revalue the current value for assessment of such property in accordance with the findings of such investigation, examination, and inspection.

"Redevelopment project valuation" is defined as "the valuation for assessment of the taxable real property in a redevelopment project last certified for the year prior to the effective date of the provision authorized in section 18-2147." § 18-2103(21).

Crosier Redevelopment Project.

On or about January 8, 2001, the Hastings City Council passed and approved a resolution which authorized the Authority to take the actions necessary to implement a redevelopment project known as the Crosier Redevelopment Project. The Crosier Redevelopment Project is a project involving the use of tax increment financing pursuant to the Community Development Law and the redevelopment plan approved by the city council.

The Authority entered an allocation agreement, providing for payment of debt by the Authority utilizing these funds. The redevelopment plan approved by the city council provided that the effective date of the project would be January 1, 2002, and that the redevelopment project valuation date would accordingly be January 1, 2001. On or about April 23, 2001, the city council passed a resolution, approving an amended redevelopment project plan, which amended plan changed the effective date of the project to January 1, 2001, and the redevelopment project valuation date to January 1, 2000. In May 2001, the Authority notified the county assessor's office concerning the Crosier Redevelopment Project and requested that the county assessor certify the redevelopment project valuation in accordance with § 18-2148. On May 1, 2002, the county assessor acknowledged that the taxable value for the property in question for 2000 was $0 because "'it was tax exempt property belonging to Crosier's, a nonprofit entity.'" On May 2, the county assessor issued a certificate as to the redevelopment project valuation for January 1, 2000, in the amount of $614,440. On June 1, 2002, the county assessor's office changed the redevelopment project valuation to $900,475.

Procedural History.

On October 15, 2003, the Authority filed a complaint for declaratory judgment and writ of mandamus. The Authority alleged, among other things, that without the correct certification of the redevelopment project valuation by the county assessor, the Authority would not be able to collect tax increment funds as allowed under the Community Development Law. The Authority alleged that despite demand upon the county assessor that the redevelopment project valuation be properly set at $0, the county assessor had failed to make the proper certification as required by law. The Authority alleged that certification of the correct redevelopment project valuation was a purely ministerial action and that the refusal to make such certification was arbitrary, capricious, and contrary to the law. The Authority sought an order declaring what the redevelopment project valuation properly should be and a writ of mandamus compelling the county assessor to show cause why

she had not properly certified the valuation on or before a date to be set by the court.

The Authority filed a motion for summary judgment on April 9, 2004, and the County filed a motion for partial summary judgment on May 3. On May 14, an evidentiary hearing was held on the summary judgment motions, and on July 29, the district court entered an order making certain findings of fact and conclusions of law but overruling the motions for summary judgment. The court, relying on the Nebraska Supreme Court's ruling in *State ex rel. Scoular Prop. v. Bemis*, 242 Neb. 659, 496 N.W.2d 488 (1993), found that the property did have a value and that the county assessor accordingly complied with her lawful duty to set a value. The district court also ruled that "additional evidence [was] required to make a correct finding as to the property's value of either $614,440.00 or $900,47[5].00."

Trial was held before the district court on April 13, 2005. In addition to the facts set forth above, the testimony and evidence at trial showed that the property in question, known as the Crosier Monastery, was purchased in January 2001 for $32,500, by an entity in which Thomas Lauvetz is the general partner. Evidence was presented to indicate that at the time of purchase, the property had no value on the real estate market. Other evidence was presented to indicate that the price of $32,500 for the real estate was an appropriate and fair price, based upon an arm's-length transaction. The main building on the property was built in 1889, with the addition of a chapel and two sleeping wings in 1961. At the time of trial, the chapel was being leased to the Catholic Diocese of Lincoln. Evidence was presented regarding the building's numerous drawbacks and defects, including evidence that the cost to bring the building into full code compliance was $2 million. Lauvetz testified that he made numerous improvements to the property, at a cost of $1.3 million, and, while the exact timing of these improvements is somewhat unclear from the record, the record reflects that these improvements would have been made after the January 1, 2000, valuation date set forth in the amended redevelopment project plan.

The last valuation certified by the county assessor's office was based on an appraisal of $900,475 by Darrel Stanard, a licensed appraiser. Stanard testified that the $614,440 value was attributed solely to the church or chapel on the property and was derived using appraisal software and manuals, based on the square footage, building costs, and depreciation. Stanard testified that the $900,475 value included the land, church, and the rest of the building to which the church is connected. This appraisal was an attempt to determine the value of the property for 2001, and included at least some of the improvements made by Lauvetz.

On November 1, 2005, the district court entered a declaratory judgment setting the value of the property at $32,500 and issued a writ of mandamus, requiring the county assessor to transmit such value in accordance with Nebraska's Community Development Law. With respect to the valuation, the district court noted that it did not have evidence before it at the time of its summary judgment order as to the true condition of the building and that based upon the trial evidence, the correct redevelopment project valuation as of January 1, 2000, was $32,500. The court stated that $32,500 was "[t]he only value that actually makes sense and has any relation to true market value at the time." The court rejected the Authority's requested valuation of $0, relying on the Nebraska Supreme Court's analysis in *State ex rel. Scoular Prop. v. Bemis*, 242 Neb. 659, 496 N.W.2d 488 (1993), and concluded that the property could not have a value of $0 based solely on its previous exempt status. The district court also discussed and rejected the County's requested valuation of $900,475, based upon certain inadequacies in Stanard's appraisal identified by the court, stating that the County had requested a valuation that had "no relation to actual market value or logic."

The district court addressed the County's argument that it did not have subject matter jurisdiction and that the case should have been brought first to the Adams County Board of Equalization and subsequently appealed to the Tax Equalization and Review Commission (TERC). The court concluded that because there is no appeal process included in the statutory scheme for Nebraska's Community Development Law, a

mandamus action is an appropriate remedy. Finally, the district court noted the requirements of a writ of mandamus and found that the requirements had been met in this case.

The County filed a motion for new trial, which was overruled by the district court on December 14, 2005. Subsequently, the County perfected its appeal to this court, and the Authority perfected its cross-appeal.

ASSIGNMENTS OF ERROR

[1,2] In its brief, the County did not separately assign error as required by Neb. Ct. R. of Prac. 9D(1)(e) (rev. 2006), which requires a separate section for assignments of error, designated as such by a heading, and requires that the section be located in the sequence specified by rule 9D(1)—after a statement of the case and before a list of controlling propositions of law. To be considered by an appellate court, an alleged error must be both specifically assigned and specifically argued in the brief of the party asserting the error. *City of Gordon v. Montana Feeders, Corp.*, 273 Neb. 402, 730 N.W.2d 387 (2007). Although an appellate court ordinarily considers only those errors assigned and discussed in the briefs, the appellate court may, at its option, notice plain error. *Linch v. Northport Irr. Dist.*, 14 Neb. App. 842, 717 N.W.2d 522 (2006). In the interest of fairness, we have reviewed the record for plain error.

On cross-appeal, the Authority asserts that the district court erred when it failed to amend its final order to show that the county assessor was required to transmit a value of $5,735 upon receipt of exhibit 16 during the hearing on the motion for new trial.

ANALYSIS

Jurisdiction.

[3,4] Before reaching the legal issues presented for review, it is the power and duty of an appellate court to determine whether it has jurisdiction over the matter before it, irrespective of whether the issue is raised by the parties. *Chase 3000, Inc. v. Nebraska Pub. Serv. Comm.*, 273 Neb. 133, 728 N.W.2d 560 (2007). When a lower court lacks the authority to exercise its subject matter jurisdiction to adjudicate the merits of a claim,

issue, or question, an appellate court also lacks the power to determine the merits of the claim, issue, or question presented to the lower court. *Id.* Accordingly, before turning to our plain error analysis, we first examine the County's assertion that the district court did not have jurisdiction in this case.

[5] The County argues that the matter of the redevelopment property valuation should have been brought first before the Adams County Board of Equalization and then appealed to the TERC. Neb. Rev. Stat. § 77-1501 (Cum. Supp. 2006) currently provides, in part, that "[t]he county board of equalization shall fairly and impartially equalize the values of all items of real property in the county so that all real property is assessed uniformly and proportionately." Among other things, Neb. Rev. Stat. § 77-5007 (Supp. 2007) currently provides:

> The [TERC] has the power and duty to hear and determine appeals of:
>
> (1) Decisions of any county board of equalization equalizing the value of individual tracts, lots, or parcels of real property so that all real property is assessed uniformly and proportionately;
>
> . . . .
>
> (10) Any other decision of any county board of equalization.

The County notes that the Nebraska Supreme Court has stated that a property owner's exclusive remedy for relief from overvaluation of property for tax purposes is by protest to the county board of equalization. *Bartlett v. Dawes Cty. Bd. of Equal.*, 259 Neb. 954, 613 N.W.2d 810 (2000). However, in the present case, the valuation was not for tax purposes, but, rather, for purposes of obtaining tax increment financing under the Community Development Law. Furthermore, the Authority is not the property owner.

The present case is similar to *State ex rel. Scoular Prop. v. Bemis*, 242 Neb. 659, 496 N.W.2d 488 (1993). In that case, a private corporation purchased certain real property, which had a previous assessed valuation of $0 and was classified as exempt because it had been owned by a public service entity. The corporation entered into a redevelopment agreement with the City of Omaha, Nebraska, and as the final step in obtaining tax

increment financing, the city requested that the county assessor transmit to the city and to the county treasurer the redevelopment project valuation. Upon receiving the request, the county in that case had an appraiser inspect the property who recommended a valuation of $1,360,000, which value was adopted by the county as the figure for the previous year for the base redevelopment valuation. A mandamus action was then initiated to force the county to transmit a $0 valuation, which the relator contended was required by § 18-2148. On appeal, the Nebraska Supreme Court found, among other things, that the previous $0 valuation resulted from the fact that the property had been exempt and should have alerted the relator that it was not entitled to rely on that valuation. The court determined that the county assessor had complied with the duty to furnish the redevelopment project valuation and that the trial court had thus been correct in refusing to grant the requested writ of mandamus.

The *State ex rel. Scoular Prop.* case was decided before the creation of the TERC, but we see nothing in the statutes relating to the TERC or in the Community Development Law itself to indicate that a mandamus action is no longer an appropriate remedy for an authority that believes that a county assessor has not complied with his or her duty under § 18-2148 to transmit a redevelopment project valuation. There is no provision in the Community Development Law requiring a hearing before a board of equalization and then an appeal to the TERC when a county assessor has allegedly failed in this duty. We find no error in the district court's conclusion that a mandamus action was an appropriate remedy in this case.

Plain Error Analysis.

[6] Although the County did not specifically assign errors in its appeal to this court, we have reviewed the record for plain error. Plain error is error plainly evident from the record and of such a nature that to leave it uncorrected would result in damage to the integrity, reputation, or fairness of the judicial process. *Linch v. Northport Irr. Dist.*, 14 Neb. App. 842, 717 N.W.2d 522 (2006).

[7] We find no plain error in the district court's determination that a writ of mandamus was appropriate or in the court's

declaration of the value to be transmitted. Mandamus is a law action and is defined as an extraordinary remedy, not a writ of right, issued to compel the performance of a purely ministerial act or duty, imposed by law upon an inferior tribunal, corporation, board, or person, where (1) the relator has a clear right to the relief sought, (2) there is a corresponding clear duty existing on the part of the respondent to perform the act, and (3) there is no other plain and adequate remedy available in the ordinary course of law. *State ex rel. Upper Republican NRD v. District Judges*, 273 Neb. 148, 728 N.W.2d 275 (2007). See, generally, *State ex rel. Scoular Prop. v. Bemis*, 242 Neb. 659, 496 N.W.2d 488 (1993) (finding that "clear duty" existed under § 18-2148 on part of county assessor to transmit upon request redevelopment project valuation). The district court did not commit plain error in finding that the assessor failed to comply with the legal duty to transmit a value for the property as of January 1, 2000, the project valuation date.

The district court did not commit plain error in the issuance of a writ of mandamus, directing the county assessor to comply with her statutory duty and to transmit a value of $32,500 in accordance with Nebraska's Community Development Law. The property at issue in this case is very unique, and based upon the facts of this case and our review for plain error, we find no error plainly evident from the record and of such a nature that to leave it uncorrected would result in damage to the integrity, reputation, or fairness of the judicial process.

We have also reviewed for plain error the district court's consideration of valuation evidence beyond the two valuations noted in its summary judgment order of either $614,440 or $900,475, and we find no error in the receipt of such valuation evidence.

Authority's Cross-Appeal.

[8] On cross-appeal, the Authority asserts that the district court erred when it failed to amend its final order to show that the county assessor was required to transmit a value of $5,735 upon receipt of exhibit 16, an affidavit of Lauvetz, during the hearing on the motion for new trial. There is nothing in the record to show that the Authority actually sought such a

decision from the district court. The motion for new trial was filed by the County. At the hearing on the County's motion, counsel for the Authority offered exhibit 16, indicated that the Authority was satisfied with the decision of the district court, and argued:

> I did submit an affidavit of . . . Lauvetz to indicate that we've subsequently learned for the tax year 2000, which was the initial tax year in question here, that the county had placed a value on the property, $5,735. . . . Lauvetz had recently sold the property and had to pay taxes based on that amount for the year 2000 in order to clear title for passage of the property to the new owner. And so if the Court does order a new trial, we intend to show this further, in additional evidence which we believe supports the Court's original decision even further.

An appellate court will not consider an issue on appeal that was not presented to or passed upon by the trial court. *Pohlmann v. Nebraska Dept. of Health & Human Servs.*, 271 Neb. 272, 710 N.W.2d 639 (2006). Because the issue of whether the assessor should have transmitted a redevelopment project valuation of $5,735 was not presented to the district court for decision, it is not appropriate for this court to resolve that issue on appeal. The Authority's cross-appeal is without merit.

CONCLUSION

We find no plain error in the district court's declaratory judgment and writ of mandamus entered in favor of the Authority. We make no determination with regard to the Authority's cross-appeal, because the issue raised was not presented to the district court for determination.

AFFIRMED.

D B Feedyards, Inc., a Nebraska corporation, appellee, v. Environmental Sciences, Inc., a Nebraska corporation, and Kendall Bonenberger, appellants.

745 N.W.2d 593

Filed March 4, 2008. No. A-06-471.

1. **Judgments: Jurisdiction: Appeal and Error.** When a jurisdictional question does not involve a factual dispute, determination of the issue is a matter of law, which requires an appellate court to reach a conclusion independent from that of the trial court.
2. **Summary Judgment.** Summary judgment is proper when the pleadings and evidence admitted at the hearing disclose that there is no genuine issue as to any material fact or as to the ultimate inferences that may be drawn from those facts and that the moving party is entitled to judgment as a matter of law.
3. **Summary Judgment: Appeal and Error.** In reviewing a summary judgment, an appellate court views the evidence in the light most favorable to the party against whom the judgment is granted and gives such party the benefit of all reasonable inferences deducible from the evidence.
4. **Judgments: Moot Question: Appeal and Error.** When a party voluntarily complies with the mandate of the trial court, satisfying the judgment, the appeal no longer presents an actual controversy, but an abstract question.
5. **Judgments: Appeal and Error.** Payment of a judgment does not destroy the right to appeal when the record shows that the payment was coerced by legal process during the pendency of the appeal.
6. **Judgments: Affidavits: Appeal and Error.** The burden falls to the appellant to demonstrate, by affidavit, that the appellant's satisfaction of the judgment was not voluntary, but was instead the result of coercion by legal process.
7. **Negligence: Damages: Proximate Cause.** In order to prevail in a negligence action, a plaintiff must establish the defendant's duty to protect the plaintiff from injury, a failure to discharge that duty, and damages proximately caused by the failure to discharge that duty.
8. **Negligence.** Whether a legal duty in negligence exists is a question of law.
9. ____. In negligence cases, the duty is always the same, to conform to the legal standard of reasonable conduct in light of the apparent risk.
10. **Negligence: Appeal and Error.** In determining whether a duty exists, an appellate court employs a risk-utility test, considering (1) the magnitude of the risk, (2) the relationship of the parties, (3) the nature of the attendant risk, (4) the opportunity and ability to exercise care, (5) the foreseeability of the harm, and (6) the policy interest in the proposed solution.
11. **Negligence.** Once a court determines that a duty is owed by one party to another, it becomes necessary to define the scope and extent of the duty. In other words, the necessary complement of duty—the standard of care—must be ascertained.

12. ____. Determining the standard of care to be applied in a particular case is a question of law.
13. **Negligence: Evidence: Tort-feasors.** The ultimate determination of whether a party deviated from the standard of care and was therefore negligent is a question of fact. To resolve the issue, a finder of fact must determine what conduct the standard of care would require under the particular circumstances presented by the evidence and whether the conduct of the alleged tort-feasor conformed with the standard.
14. **Summary Judgment: Proof.** A party moving for summary judgment must make a prima facie case by producing enough evidence to demonstrate that the movant is entitled to judgment if the evidence were uncontroverted at trial.
15. ____: ____. Once the moving party makes a prima facie case, the burden to produce evidence showing the existence of a material issue of fact that prevents judgment as a matter of law shifts to the party opposing the motion.
16. **Negligence: Damages: Proof.** The burden of tying the negligence to the damage claimed remains on the claimant even when the other party is guilty of negligence as a matter of law.
17. **Proximate Cause: Words and Phrases.** A proximate cause is a cause that (1) produces a result in a natural and continuous sequence and (2) without which the result would not have occurred.
18. ____: ____. A defendant's conduct is a proximate cause of an event if the event would not have occurred but for that conduct, but it is not a proximate cause if the event would have occurred without that conduct.
19. **Proximate Cause.** A proximate cause need not be the sole cause; it need only be "a" proximate cause.
20. **Proximate Cause: Evidence.** The question of proximate cause, in the face of conflicting evidence, is ordinarily one for the trier of fact, and the court's determination will not be set aside unless clearly wrong.
21. **Appeal and Error.** An appellate court is not obligated to engage in an analysis that is not needed to adjudicate the controversy before it.

Appeal from the District Court for Burt County: DARVID D. QUIST, Judge. Affirmed in part, and in part reversed and remanded for further proceedings.

William H. Selde, of Sodoro, Daly & Sodoro, P.C., for appellants.

Jaron J. Bromm and Curtis A. Bromm, of Edstrom, Bromm, Lindahl & Freeman-Caddy, and, on brief, Donald G. Blankenau and Thomas R. Wilmoth, of Blackwell, Sanders, Peper & Martin, L.L.P., for appellee.

IRWIN, SIEVERS, and MOORE, Judges.

MOORE, Judge.

INTRODUCTION

D B Feedyards, Inc., filed a complaint setting forth claims for breach of contract, negligence, and breach of warranties in the district court for Burt County against Environmental Sciences, Inc. (ESI), and Kendall Bonenberger, the president of ESI. The district court entered summary judgment in favor of D B Feedyards on its negligence claim. ESI and Bonenberger (hereinafter collectively the Appellants) appeal. For the reasons set forth herein, we affirm the grant of summary judgment on the issue of negligence, but we reverse, and remand for further proceedings on the issue of causation.

BACKGROUND

Dispute.

D B Feedyards operates a cattle feedlot in Nebraska that feeds, on average, over 4,000 head of cattle. D B Feedyards received a letter from Nebraska's Department of Environmental Quality (DEQ) in May 2002, notifying it that a livestock waste control facility was required for its cattle operations. The DEQ required the facility permit application to be filed by December 1, 2002. On July 16, D B Feedyards retained ESI to perform various environmental consulting services and to prepare and submit to the DEQ, on behalf of D B Feedyards, the application for a permit to construct and operate a licensed waste control facility.

ESI missed multiple deadlines established by the DEQ for submission of the facility permit application. Although ESI submitted an application on March 27 or 28, 2003, the application was found incomplete by the DEQ and was returned to ESI. The DEQ required the complete application to be filed no later than October 21. ESI, however, failed to do so without explanation to the DEQ or to D B Feedyards. On December 23, ESI assured D B Feedyards that a complete application would be filed by mid-January 2004. ESI failed to do so and, in fact, never submitted a complete facility application to the DEQ for D B Feedyards.

On December 27, 2004, the U.S. Environmental Protection Agency (EPA) issued to D B Feedyards a compliance order and notice of violations of the federal Clean Water Act. The EPA threatened a fine of $157,500 for alleged violations commencing on April 24, 2003, the date the DEQ notified ESI that the facility permit application was incomplete. The EPA indicated that the failure to submit a timely permit application to the DEQ precipitated the penalty action. D B Feedyards settled the penalty action with the EPA on August 29, 2005, for $135,000. D B Feedyards incurred $15,799.50 in fees defending the EPA action. Following the EPA action, D B Feedyards terminated its relationship with ESI and hired another consultant to prepare and file the facility application. After paying $24,681.53 to ESI, D B Feedyards had to pay the new consultant $51,300 to perform the work ESI failed to do. D B Feedyards also paid a $1,500 application fee for the incomplete application submitted by ESI.

Procedural Background.

D B Feedyards filed a complaint in the district court against the Appellants on June 24, 2005. D B Feedyards set forth claims for breach of contract, negligence, and breach of warranties, and alleged damages of $207,300.

The Appellants answered on August 16, 2005. We do not set forth the details of the answer except to note ESI affirmatively alleged that it exercised a reasonable degree of knowledge and skill, the same as ordinarily possessed by others engaged in the business or trade, and that any claim of damage was the product of the actions of others not subject to the direct control of ESI.

On October 21, 2005, D B Feedyards filed a motion for summary judgment, which was heard by the court on December 5. At the hearing, the court received into evidence an affidavit of Rodney Bromm, the president and general manager of D B Feedyards; an affidavit of Dennis Grams, an environmental engineer and consultant; various documents from the DEQ file on D B Feedyards; and an affidavit of Bonenberger.

In Bromm's affidavit, he recited details of D B Feedyards' relationship with ESI and the action initiated by the EPA.

Bromm stated that in response to the May 2002 letter of the DEQ, he contacted ESI to perform various environmental consulting services. Bromm informed ESI of the DEQ letter, provided it with a copy, and inquired as to whether ESI had the requisite knowledge and abilities to perform the services required. Bromm stated that Bonenberger assured Bromm that he had significant experience in and specialized knowledge for preparing and submitting the necessary permit applications to comply with the DEQ letter.

Bromm stated that in hiring ESI to perform consulting services, ESI acknowledged to him that it was aware of the deadline given by the DEQ for submission of the permit application and gave no indication that it could not meet the deadline. Bromm contacted ESI several times in 2004 to inquire about the status of the permit application and was always assured that deadlines would be met. Bonenberger informed Bromm that ESI was waiting for Nebraska's Department of Natural Resources (DNR) to approve a dam safety permit application. In June 2004, D B Feedyards contacted the DNR and was informed that no such application had been submitted to the DNR on behalf of D B Feedyards. ESI then assured D B Feedyards that the dam safety permit application must have been lost or misplaced and that it would be filed immediately. ESI, however, never filed the application with the DNR.

Bromm stated that with respect to the action by the EPA, the EPA made clear, both in negotiations and in a consent agreement and final order filed August 29, 2005, that its decision to pursue an enforcement action against D B Feedyards was precipitated by the failure to file a timely waste control facility permit application with the DEQ.

Grams is a licensed professional engineer with over 30 years of experience in environmental engineering and consulting. Grams has been involved in the processing of hundreds of environmental permits from the DEQ and the EPA. Grams is the former regional administrator for the EPA region including Nebraska, Iowa, Missouri, and Kansas. Prior to occupying that position, Grams served as the director for the predecessor agency to the DEQ. In his affidavit, Grams explained that it is common for feedlot operators to rely on the expertise of

environmental consultants when attempting to comply with state and federal environmental permitting requirements. Grams stated that a reasonable and prudent consultant understands that it is responsible for communicating with state and federal agencies during the environmental permitting process. Grams stated that a reasonable and prudent environmental consultant understands that the failure to comply with DEQ guidelines can result in significant civil, administrative, or even criminal penalties and does not consistently ignore deadlines imposed by state and federal environmental agencies. Grams opined that ESI's conduct in assisting D B Feedyards to file the permit application was simply unacceptable in the industry. Grams opined further that ESI failed in every respect to be reasonable or prudent by failing to communicate in a timely and truthful manner with the DEQ on behalf of D B Feedyards, failing to follow through on its promises to the DEQ, diminishing the DEQ's confidence in D B Feedyards' willingness to comply, failing to comply with the basic regulations to ensure that the application ESI filed was complete, and failing to file a complete application in a timely manner.

Grams also expressed, based on his experience working for the EPA and the predecessor to the DEQ, his belief that the EPA generally uses enforcement actions as a last resort to bring about compliance and that one of the most significant factors in determining whether an enforcement action is necessary is evidence of good faith efforts to timely meet agency demands, or lack thereof. Grams stated that when numerous deadlines are missed and communication with the agencies is sparse or nonexistent, as in this case, the agencies will turn to their last resort and file a civil penalty action to force compliance. Grams opined that the administrative penalty action in this case would not have been commenced if ESI would have filed an application with the DEQ in a timely manner.

In Bonenberger's affidavit, he stated that his understanding, after reviewing DEQ records, was that D B Feedyards was an entity with a long history of noncompliance with DEQ requirements dating back to 1989. Bonenberger alleged that all fines, sanctions, and/or penalties suffered by D B Feedyards were not the product of any actions, inactions, or activities of ESI

and/or Bonenberger, but were a product of D B Feedyards' continued violations and noncompliance dating back to 1990. Bonenberger alleged, based upon his education, training, and experience, that if D B Feedyards had complied with a DEQ request from 1993, no damages, fines, and/or sanctions would have been imposed against D B Feedyards and ESI's services would not have been required.

Bonenberger stated that ESI became aware in December 2002 or January 2003 that due to the size of the proposed holding pond at D B Feedyards, an additional application was necessary for submission to the DNR. Bonenberger expressed his understanding that the livestock waste control facility application would be submitted to the DEQ and the DNR at the same time and that a consulting engineering firm, the Flatwater Group, Inc., was retained for D B Feedyards' engineering needs. Bonenberger stated that in March 2004, he met with "the consulting engineer" retained by ESI for the project on behalf of D B Feedyards and was informed that the engineer would promptly submit the revised application to the DEQ and the DNR to obtain a construction permit. Bonenberger stated that in approximately September 2004, the services of ESI were withdrawn and formally terminated, on the advice of Bromm that D B Feedyards was still afforded time to submit an appropriate application for a construction permit to the DEQ.

Bonenberger alleged that all alleged damages suffered by D B Feedyards were not a product of any negligence on the part of ESI but were the proximate result of the acts and actions of D B Feedyards, its consultants, its engineers, and/or others prior to July 2002. Bonenberger stated that the EPA investigation found violations and sanctions which were totally unrelated to the services and/or contractual obligations of ESI to D B Feedyards and that half of all the recommendations made by the EPA were exclusive of services contemplated and/or included in the contractual and/or consulting agreement between ESI and D B Feedyards.

Bonenberger opined, based upon his education, training, and experience as an environmental consultant, that the sole and proximate cause of any damages suffered by D B Feedyards was the result of the negligence of D B Feedyards, prior to

any association with ESI, and/or the result of the negligence of D B Feedyards' consultants and others subsequent to the termination of the contractual relationship between the parties. Bonenberger alleged that it was not the duty or obligation of ESI to obtain the DNR storage permit in March or April 2003, because this application and permit required the stamp of a registered professional engineer, "the aforementioned Flatwater Group," which entity ESI could neither compel nor control in performing its function as a professional engineer. Bonenberger further alleged that the sole and proximate cause of any damages suffered by D B Feedyards was the negligence of the Flatwater Group in failing to timely compile and complete its engineering duties. Bonenberger opined that none of the ultimate sanctions rendered against D B Feedyards as a result of a May 2004 EPA inspection would have accrued but for D B Feedyards' continued and protracted failure to comply with the requirements of the Clean Water Act (hereinafter CWA), 33 U.S.C. § 1251 et seq. (2000), and/or title 130 of the rules and regulations of the DEQ. Finally, Bonenberger opined that the fine in the amount of $135,000 does not reflect fines or sanctions limited to the scope or term of employment or consulting services by or between the parties.

Documents from the EPA are attached to various affidavits in the record, including the inspection report of May 6, 2004; the compliance order and notice of violations filed December 27, 2004; and the consent agreement and final order filed August 29, 2005. A brief recitation of the statutory and regulatory provisions involved in this case, as gleaned from these documents, is helpful to understand this case. Section 1311(a) of the CWA prohibits the discharge of pollutants except in compliance with, inter alia, § 1342 of the CWA. Section 1342 provides that pollutants may be discharged only in accordance with the terms of a "National Pollutant Discharge Elimination System" permit issued pursuant to that section. "Pollutant" includes biological materials and agricultural waste discharged to water. The regulations promulgated to implement § 1342 define "animal feeding operations" that are covered by the CWA. The number of cattle confined and fed at D B Feedyards brings it under the CWA.

The foregoing documents also state that D B Feedyards did not have adequate livestock waste controls, nor did it have a National Pollutant Discharge Elimination System permit. The only waste controls in place consisted of settling basins that discharge into a tributary of Bell Creek, which does come under the definition of "waters" governed by the CWA. A previous compliance order was issued by the DEQ in 1990, requiring D B Feedyards to submit a permit application for construction of wastewater controls. A permit application submitted in 1991 was incomplete, as were two subsequent applications. A construction permit submitted and issued in 1992 was revoked in 1994. The next permit application was March 28, 2003, the one submitted by ESI on behalf of D B Feedyards. The May 2004 inspection noted other areas of concern beyond the construction of livestock waste controls, including the need to maintain records of all precipitation events, to develop a plan relating to the storage of diesel fuel and gasoline tanks, and to develop and implement best management practices.

The EPA compliance order and notice of violations states, in part:

> The ongoing flow of wastewater from [D B Feedyards] to Bell Creek and its unnamed tributary constitutes an unauthorized discharge of pollutants from a point source to waters of the United States. *This, and* [D B Feedyards'] failure to obtain a permit from [the] DEQ are violations of Sections [1311] and [1342] of the CWA.

(Emphasis supplied.)

The EPA consent agreement and final order states, in part:

> Although [D B Feedyards] has submitted numerous applications to construct livestock waste controls, it has thus far failed to submit a proper or complete application as directed by [the] DEQ. *Most recently*, [D B Feedyards'] consultant submitted a permit application on March 28, 2003. [D B Feedyards] and [the] consultant were notified by [the] DEQ that the March 28, 2003 application was incomplete on April 24, 2003. No new or corrected permit application has been submitted since that date. This failure was *one of the factors* that precipitated this action.

(Emphasis supplied.)

The district court entered an order on March 23, 2006, granting summary judgment in D B Feedyards' favor on its claim for negligence, and awarding damages of $229,561. We have set forth those portions of the district court's analysis necessary to our resolution of this appeal in the analysis section below.

Postjudgment Proceedings.

The Appellants filed their notice of appeal on April 21, 2006. Also on that date, the parties entered into a stipulation that the district court could enter an order extending the time for the Appellants to submit a supersedeas bond from April 21 to May 22, that the amount of the supersedeas bond should be $278,000, and that the supersedeas bond "[could] be provided by any insurer authorized to do business in the State of Nebraska." The district court entered an order on April 26, approving the stipulation and extending the filing deadline for the supersedeas bond from April 21 until May 22.

On May 22 or 23, 2006, the Appellants' counsel, who was out of town, was advised by the district court that in lieu of a supersedeas bond, the Appellants' insurance carrier had tendered a check in the amount of $278,000. On May 23, the Appellants' counsel requested counsel for D B Feedyards to agree to substitution of a cash deposit in lieu of a supersedeas bond, which request was denied by D B Feedyards' counsel on May 25. The Appellants gave notice on May 25 of filing a supersedeas cash deposit in lieu of a bond. The Appellants' counsel also contacted the court and was informed that the district judge was not available for a hearing on May 25 and would be unavailable for hearings until June, due to the Memorial Day holiday.

On May 31, 2006, D B Feedyards filed a motion seeking to declare the supersedeas bond untimely. On June 2, the Appellants filed a motion and order for supersedeas cash deposit in lieu of a bond. The district court heard oral argument on these motions on June 19 and, on July 20, entered an order finding that the Appellants had failed to supersede the judgment entered on March 23, as required by Neb. Rev. Stat. § 25-1916 (Cum. Supp. 2006).

The court entered an order on October 10, 2006, denying the Appellants' motion for reconsideration of its July 20

order. Also on October 10, the court entered an order granting D B Feedyards' application for disbursement of funds and disbursing funds totaling $236,845.25 to D B Feedyards, which amount represented the amount of judgment, plus interest and costs. The court ordered that the balance of the $278,000 check of May 22 was to be disbursed to ESI and its attorney.

D B Feedyards moved for summary dismissal of the appeal, asserting that the appeal is moot because the Appellants had voluntarily satisfied the judgment against them. We overruled the motion, but reserved the issue of mootness for disposition upon submission of the appeal.

ASSIGNMENT OF ERROR

The Appellants assert, consolidated and restated, that the district court erred in granting summary judgment in favor of D B Feedyards.

STANDARD OF REVIEW

[1] When a jurisdictional question does not involve a factual dispute, determination of the issue is a matter of law, which requires an appellate court to reach a conclusion independent from that of the trial court. *Susan L. v. Steven L.*, 273 Neb. 24, 729 N.W.2d 35 (2007).

[2,3] Summary judgment is proper when the pleadings and evidence admitted at the hearing disclose that there is no genuine issue as to any material fact or as to the ultimate inferences that may be drawn from those facts and that the moving party is entitled to judgment as a matter of law. *Johnson v. Knox Cty. Partnership*, 273 Neb. 123, 728 N.W.2d 101 (2007). In reviewing a summary judgment, an appellate court views the evidence in the light most favorable to the party against whom the judgment is granted and gives such party the benefit of all reasonable inferences deducible from the evidence. *Id.*

ANALYSIS

Mootness.

[4] The law is clear that "'[w]hen an ordinary law action is pending in this court on appeal, and the parties by agreement settle and dispose of the whole controversy, it becomes, so far as this court is concerned, a moot case, and will not be further

investigated, but will be dismissed.'" *Hormandl v. Lecher Constr. Co.*, 231 Neb. 355, 357, 436 N.W.2d 188, 190 (1989), quoting *Schlanbusch v. Schlanbusch*, 103 Neb. 588, 173 N.W. 580 (1919). When a party voluntarily complies with the mandate of the trial court, satisfying the judgment, the appeal no longer presents an actual controversy, but an abstract question. *Hormandl v. Lecher Constr. Co., supra*. Accordingly, we must first determine the effect of the postjudgment proceedings in this case.

Did Appellants Voluntarily Pay Judgment?

[5,6] The rule in Nebraska is that payment of a judgment does not destroy the right to appeal when the record shows that the payment was coerced by legal process during the pendency of the appeal. *Green v. Hall*, 43 Neb. 275, 61 N.W. 605 (1895); *Ray v. Sullivan*, 5 Neb. App. 942, 568 N.W.2d 267 (1997). Payments have been found not to be voluntary when made to avoid a sale of property owned by the judgment debtor. See, *Burke v. Dendinger*, 120 Neb. 594, 234 N.W. 405 (1931); *Green v. Hall, supra*. Our rule requires a case-by-case examination of the facts. *Ray v. Sullivan, supra.* The burden falls to the appellant to demonstrate, by affidavit, that the appellant's satisfaction of the judgment was not voluntary, but was instead the result of coercion by legal process. See *id.*

The Appellants argue that the trial court's order disbursing the funds intended to be the supersedeas bond/cash deposit was satisfaction by coercion of legal process. This argument is not necessarily persuasive, given that the coercion as alleged by the Appellants came after the "satisfaction of judgment." However, the Appellants have made a strong showing that satisfaction of the judgment was not voluntary. Counsel for the Appellants submitted an affidavit in opposition to the motion for summary dismissal, stating that he requested a supersedeas bond in the amount of $278,000 to be tendered to the clerk of the court on May 22, 2006, and that he was out of town on that date. The Appellants' counsel stated that he received a call from the clerk of the court on the afternoon of May 22 or the morning of May 23, advising that in lieu of a supersedeas bond, a check from the Appellants' insurance carrier had been tendered in the

amount of $278,000. The Appellants' counsel stated that he immediately communicated with counsel for D B Feedyards on May 23 and requested agreement to the substitution of a supersedeas cash deposit in lieu of a supersedeas bond. On May 25, he received a return call from D B Feedyards' counsel denying the request. The Appellants' counsel then "undertook proceedings" to file a supersedeas cash deposit in lieu of a supersedeas bond.

We find some guidance in *La Borde v. Farmers State Bank*, 116 Neb. 33, 215 N.W. 559 (1927). In that case, shortly before death, the decedent changed the beneficiary of three insurance policies each worth $10,000 from his estate to his wife (appellant). The decedent died insolvent. Upon receipt of the insurance money, the appellant deposited it in the defendant bank, and the bank issued to her, against the deposit, a cashier's check for $20,000 and a draft for $10,000 drawn on a different bank. The executor of the will, on behalf of the decedent's creditors, brought an action against appellant and the defendant bank, seeking to have the change in beneficiary be decreed fraudulent as to the executor's creditors. The trial court found the change to be fraudulent, ordered that the transfer of such insurance should be canceled and set aside, and ordered the appellant and the bank pay $27,803.53 to the clerk of the court for the benefit of the estate. The record showed that after rendition of judgment and before an appeal was taken, the defendant bank paid $28,029.58 into the district court in accordance with the judgment and that the appellant objected and reserved an exception to the payment. The appellant appealed, and the executor filed a motion to dismiss the appeal based upon compliance with the judgment of the court. The Nebraska Supreme Court reasoned:

> The appellant has shown no intention of abandoning her appeal, and we are satisfied that she did not intend that the payment of the money by the defendant bank into court should be regarded as a compliance on her part with the judgment of the court so as to deprive her of the right of appeal.

Id. at 38, 215 N.W. at 561.

In the instant case, neither the Appellants nor their counsel tendered the check to the court; rather, their insurance company erroneously submitted a check rather than a bond. This is not a situation where a party paid the judgment and then, having a change in mind, sought to appeal from the judgment. There is no doubt that the parties and the trial court were well aware that the Appellants intended to file a supersedeas bond of $278,000 on May 22, 2006. The actions of the Appellants' counsel upon learning of the mistakenly submitted check clearly demonstrate that the Appellants did not intend to abandon the appeal and did not intend the check to be considered compliance with the judgment.

The district court found that the Appellants did not file a supersedeas bond or a cash deposit with the clerk of the court, but that the Appellants' representatives submitted a check, containing no guarantee or certification and not deposited with any conditions. The district court also found that none of the subsequent filings met the statutory requirements to supersede judgment. These findings of the district court have not been raised on appeal, and we do not address them further in this opinion, other than to state that even if the attempt to supersede was invalid, that is a separate and distinct question from whether the appeal is moot because of the "voluntary" payment.

In addition to the above-cited Nebraska case law, the following commentary is useful to our resolution of the question of whether the Appellants voluntarily paid the judgment:

> While it is often said that a party who voluntarily satisfies a judgment may not appeal from that judgment, certain jurisdictions do not apply this rule where the payment of a judgment is not tendered as a compromise or settlement or under an agreement not to appeal, either on the ground that such payment is involuntary, or on the ground that such payment does not necessarily constitute waiver of the right to appeal, especially where repayment or restitution may be enforced, in the event of a reversal.
>
> There is general agreement that the involuntary payment of a judgment does not preclude appeal; a judgment paid, in full or in part, under legal coercion remains ripe

> for judicial review. This rule applies in criminal as well as civil cases.
>
> Also, an appeal is not barred by a payment which does not fully satisfy the judgment, such as where there remains an issue as to the payment of attorney's fees, or where a judgment is only partially satisfied by execution. Moreover, the tender of payment by a third party who is not under the appellant's control does not indicate acceptance of the judgment, and thus does not bar the right of appeal.

5 Am. Jur. 2d *Appellate Review* § 583 at 341-42 (2007).

> Whether a payment is voluntary depends on the facts of the particular case as indicating an intention on the part of the payer to waive his or her legal rights. Thus, neither the mere statement of an intent not to waive the right of appeal, nor the failure to expressly reserve the right to appeal, necessarily determines whether a judgment was paid voluntarily.
>
> . . . .
>
> Voluntary satisfaction will not be found where payment was made in lieu of posting a supersedeas bond, nor where the appellee implicitly recognizes that payment was not voluntary by failing to move for dismissal of the appeal.

5 Am. Jur. 2d, *supra*, § 584 at 342-43. See, also, *Rosenblum v. Jacks or Better of Am. West*, 745 S.W.2d 754 (Mo. App. 1988) (payment did not moot appeal where appellees did not seek dismissal of appeal, payment did not fully satisfy judgment, and documents appended to appellant's brief reflected that payment was made in lieu of posting supersedeas bond or submitting to execution, and not voluntarily, in sense that payment was made so as to end matter).

> The payment of a money judgment does not moot an appeal where repayment can be enforced, or where there is a remaining issue of contribution. However, an appeal can be rendered moot if execution of a judgment cannot be undone, such as where specific property is sold to third parties pursuant to a court order.

5 Am. Jur. 2d, *supra*, § 608 at 362.

We conclude that the payment made in this case was not "voluntary" and thus does not moot the Appellants' appeal. The Appellants clearly intended to appeal. They sought and were granted permission to file a supersedeas bond in the amount of $278,000. The check tendered was for the exact amount of the supersedeas bond the Appellants' were seeking to file, rather than for the exact amount of the judgment, and was tendered not by the Appellants but by their insurance carrier. Once the mistake had been identified, the Appellants took prompt measures to remedy the situation, but the district court ultimately denied their request and found that they had failed to supersede the judgment. This is not a situation where, if we were to find for the Appellants on appeal, repayment of the funds that the district court ordered to be disbursed to D B Feedyards cannot be enforced. Accordingly, we proceed to consider the merits of this appeal.

Was Summary Judgment Proper?

[7] The district court found for D B Feedyards on its negligence claim. In order to prevail in a negligence action, a plaintiff must establish the defendant's duty to protect the plaintiff from injury, a failure to discharge that duty, and damages proximately caused by the failure to discharge that duty. *National Am. Ins. Co. v. Constructors Bonding Co.*, 272 Neb. 169, 719 N.W.2d 297 (2006).

[8-12] Whether a legal duty in negligence exists is a question of law. *Moglia v. McNeil Co.*, 270 Neb. 241, 700 N.W.2d 608 (2005). In negligence cases, the duty is always the same, to conform to the legal standard of reasonable conduct in light of the apparent risk. *Id.* In determining whether a duty exists, an appellate court employs a risk-utility test, considering (1) the magnitude of the risk, (2) the relationship of the parties, (3) the nature of the attendant risk, (4) the opportunity and ability to exercise care, (5) the foreseeability of the harm, and (6) the policy interest in the proposed solution. *Id.* Once a court determines that a duty is owed by one party to another, it becomes necessary to define the scope and extent of the duty. *Cerny v. Cedar Bluffs Jr./Sr. Pub. Sch.*, 262 Neb. 66, 628 N.W.2d 697

(2001). In other words, the necessary complement of duty—the standard of care—must be ascertained. *Id.* Determining the standard of care to be applied in a particular case is a question of law. *Id.* The Nebraska Supreme Court has stated that "[t]hat standard is typically general and objective and is often stated as the reasonably prudent person standard, or some variation thereof; i.e., what a reasonable person of ordinary prudence would have done in the same or similar circumstances." *Id.* at 73, 628 N.W.2d at 703-04.

> This basic standard, however, is not invariably applied in all negligence cases. For example, the standard is modified in circumstances in which the alleged tort-feasor possesses special knowledge, skill, training, or experience pertaining to the conduct in question that is superior to that of the ordinary person. Such a person is not held to the standard of a reasonably prudent person, but, rather, to a standard consistent with his or her specialized knowledge, skill, and other qualities.

Id. at 73, 628 N.W.2d at 704.

The district court observed that D B Feedyards hired ESI to perform environmental consulting services, a skill ESI held itself out to possess. The court determined that the undisputed material facts demonstrated that ESI owed a duty to perform its services to D B Feedyards as a reasonable environmental consultant with specialized knowledge, skill, training, and experience would perform them under similar circumstances. We find no error in this conclusion by the district court. Grams expounded at length in his affidavit about the duty and standard of care owed by consultants such as ESI in circumstances like those presented in this case, none of which information was rebutted by Bonenberger's affidavit.

[13] The ultimate determination of whether a party deviated from the standard of care and was therefore negligent is a question of fact. *Cerny v. Cedar Bluffs Jr./Sr. Pub. Sch., supra*. To resolve the issue, a finder of fact must determine what conduct the standard of care would require under the particular circumstances presented by the evidence and whether the conduct of the alleged tort-feasor conformed with the standard. *Id.* D B Feedyards offered the affidavit of Grams to demonstrate

what a reasonable environmental consultant would have done in the circumstances presented by this case. The district court determined that the Appellants offered no testimony or evidence to rebut the testimony of Grams. The district court found that in particular, Bonenberger failed to aver that he was familiar with the applicable standard of care, failed to offer any testimony as to what the applicable standard of care is, and failed to aver that the Appellants complied with the standard of care. The court found that the undisputed material facts demonstrate that the Appellants failed to comply with the standard of care by failing to communicate in a timely manner with the DEQ on behalf of D B Feedyards; failing to comply with DEQ regulations to ensure that the application filed on March 28, 2003, was complete; and failing to file a complete application by October 21, 2003. We find no error in the district court's determination in this regard.

[14,15] A party moving for summary judgment must make a prima facie case by producing enough evidence to demonstrate that the movant is entitled to judgment if the evidence were uncontroverted at trial. *Pogge v. American Fam. Mut. Ins. Co.*, 272 Neb. 554, 723 N.W.2d 334 (2006). Once the moving party makes a prima facie case, the burden to produce evidence showing the existence of a material issue of fact that prevents judgment as a matter of law shifts to the party opposing the motion. *Id.* We conclude that the entry of summary judgment was appropriate with regard to the district court's findings that the Appellants breached the duty of cared owed to D B Feedyards.

[16-20] We determine that there are disputed questions of material fact relating to the issue of causation which preclude summary judgment on the issue of damages. The burden of tying the negligence to the damage claimed remains on the claimant even when the other party is guilty of negligence as a matter of law. See *Beavers v. Christensen*, 176 Neb. 162, 125 N.W.2d 551 (1963). A proximate cause is a cause that (1) produces a result in a natural and continuous sequence and (2) without which the result would not have occurred. *Staley v. City of Omaha*, 271 Neb. 543, 713 N.W.2d 457 (2006). A defendant's conduct is a proximate cause of an event if the

event would not have occurred but for that conduct, but it is not a proximate cause if the event would have occurred without that conduct. *Worth v. Kolbeck*, 273 Neb. 163, 728 N.W.2d 282 (2007). A proximate cause need not be the sole cause; it need only be "a" proximate cause. See, *Meyer v. State*, 264 Neb. 545, 650 N.W.2d 459 (2002); *Fackler v. Genetzky*, 263 Neb. 68, 638 N.W.2d 521 (2002). The question of proximate cause, in the face of conflicting evidence, is ordinarily one for the trier of fact, and the court's determination will not be set aside unless clearly wrong. *Staley v. City of Omaha, supra*.

In finding that ESI's negligence proximately caused D B Feedyards' injury, the district court noted that after ESI failed to complete the permit application, the EPA initiated an enforcement action against D B Feedyards. The court found that the resulting fine was for discharges that would have been authorized had ESI filed the permit application in a timely manner. The court also relied on Grams' affidavit statement that the EPA would not have initiated an enforcement action if a timely permit application had been filed and that one of the most significant factors in determining whether to bring an enforcement action is evidence of good faith efforts to timely meet the agency's demands. The court determined that the undisputed evidence offered by D B Feedyards, even viewed in a light most favorable to the Appellants, supported no other conclusion.

The district court determined that the foregoing established a prima facie case that ESI's breach was the "sole and proximate cause" of the damages incurred by D B Feedyards and that the only evidence offered by the Appellants supported, rather than contradicted, this conclusion. Our review of the evidence, viewed in the light most favorable to the Appellants, leads us to conclude that the Appellants produced sufficient evidence to show the existence of a material issue of fact concerning the issue of causation.

Bonenberger, who reviewed the DEQ file on D B Feedyards in preparation for his affidavit statements and who certainly has some training, skill, and expertise in the area of environmental consultancy, stated that half of the findings, recommendations, and/or conclusions in the EPA inspection report of May 2004

were exclusive of the services contemplated and/or included in the contractual and/or consulting agreement between the parties. Bonenberger further stated, based upon his education, training, and experience as an environmental consultant that the fine imposed of $135,000 does not reflect fines or sanctions limited to the scope or term of employment of ESI by D B Feedyards.

The documents from the EPA indicate that it was D B Feedyards' *continued unauthorized* discharge of pollutants *and* the failure to submit a proper or complete application that precipitated the enforcement action. Further, the failure to submit a proper permit application was noted as *one of the factors* that precipitated the action. In other words, on this record, there is a question of fact as to whether the Appellants' failure to submit the permit was a proximate cause of all of the damages resulting from the EPA enforcement action.

[21] The district court also discussed Bonenberger's assertions that the proximate cause of D B Feedyards' damages was the negligence of the Flatwater Group in failing to timely compile and complete its engineering duties. Because we find that a genuine issue of material fact exists regarding causation, which requires further proceedings, we do not address further the issue of causation relative to the Flatwater Group. An appellate court is not obligated to engage in an analysis that is not needed to adjudicate the controversy before it. *Fokken v. Steichen*, 274 Neb. 743, 744 N.W.2d 34 (2008).

We conclude that the evidence submitted by the Appellants, when viewed in the light most favorable to the Appellants and giving them the benefit of all reasonable inferences deducible from the evidence, was sufficient to raise a genuine issue of material fact as to the causation of the damages suffered by D B Feedyards as a result of ESI's negligence. Accordingly, summary judgment on the issue of causation of damages was not proper.

CONCLUSION

We find that the Appellants did not voluntarily satisfy judgment so as to moot this appeal. We further find that the district court was correct in granting summary judgment on the issue of negligence but erred in granting summary judgment on the issue

of causation. Accordingly, we affirm the summary judgment in favor of D B Feedyards and against the Appellants with regard to the issue of ESI's negligence; however, we reverse, and remand for further proceedings on the issue of causation.

AFFIRMED IN PART, AND IN PART REVERSED AND REMANDED FOR FURTHER PROCEEDINGS.

MBNA AMERICA BANK, N.A., APPELLEE, V. PAUL JOHN HANSEN, APPELLANT.

745 N.W.2d 609

Filed March 4, 2008. No. A-06-748.

1. **Jurisdiction: Appeal and Error.** When a lower court lacks the authority to exercise its subject matter jurisdiction to adjudicate the merits of the claim, issue, or question, an appellate court also lacks the power to determine the merits of the claim, issue, or question presented to the lower court.
2. **Judgments: Jurisdiction: Appeal and Error.** A jurisdictional question which does not involve a factual dispute is determined by an appellate court as a matter of law, which requires the appellate court to reach a conclusion independent of the lower court's decision.
3. **Rules of the Supreme Court: Appeal and Error.** A party may move for rehearing in an appellate court based upon any claimed mistakes or inaccuracies in statements of fact or law in the opinion, and any questions involved which the court is claimed to have failed to consider on the appeal.
4. **Jurisdiction: Words and Phrases.** Subject matter jurisdiction is a court's power to hear and determine a case in the general class or category to which the proceedings in question belong and to deal with the general subject involved in the action before the court and the particular question which it assumes to determine.
5. **Actions: Jurisdiction.** Lack of subject matter jurisdiction may be raised at any time by any party or by the court sua sponte.
6. **Jurisdiction.** Parties cannot confer subject matter jurisdiction upon a judicial tribunal by either acquiescence or consent, nor may subject matter jurisdiction be created by waiver, estoppel, consent, or conduct of the parties.
7. **Constitutional Law: Jurisdiction: Legislature.** The jurisdiction of the district courts conferred by the terms of the Nebraska Constitution, as thus conferred, is beyond the power of the Legislature to limit or control; while the Legislature may grant to the district courts such other jurisdiction as it may deem proper, it cannot limit or take away from such courts their broad and general jurisdiction which the constitution has conferred upon them.
8. **Courts: Jurisdiction.** A county court has concurrent original jurisdiction with the district court in all civil actions of any type when the amount in controversy is $51,000 or less.

9. **Courts: Jurisdiction: Arbitration and Award: Words and Phrases.** Pursuant to Neb. Rev. Stat. § 25-2618(a) (Cum. Supp. 2006), the term "court" shall mean any district court of this state. The making of an agreement described in Neb. Rev. Stat. § 25-2602.01 (Cum. Supp. 2006) providing for arbitration in this state confers jurisdiction on the court to enforce the agreement under the Uniform Arbitration Act and to enter judgment on an award thereunder.
10. **Statutes: Appeal and Error.** Appellate courts give statutory language its plain and ordinary meaning and will not resort to interpretation to ascertain the meaning of statutory words which are plain, direct, and unambiguous.
11. **Statutes.** It is not within the province of a court to read a meaning into a statute that is not warranted by the language; neither is it within the province of a court to read anything plain, direct, and unambiguous out of a statute.
12. **Statutes: Appeal and Error.** If the language of a statute is clear, the words of such statute are the end of any judicial inquiry regarding its meaning.
13. **Statutes.** To the extent that a conflict exists between two statutes on the same subject, the specific statute controls over the general statute.
14. **Courts: Jurisdiction: Arbitration and Award.** Jurisdiction over confirmation of arbitration awards is conferred upon the district court by Neb. Rev. Stat. § 25-2618 (Cum. Supp. 2006), and the county court has no such jurisdiction.
15. **Constitutional Law: States.** The Supremacy Clause of the U.S. Constitution dictates that state law, including constitutional law, is superseded to the extent it conflicts with federal law.
16. **Jurisdiction: Appeal and Error.** Even though an appellate court may lack jurisdiction to hear the merits of the case, the appellate court does have authority to vacate a lower court's order, and, if appropriate, remand the case for further proceedings, when such order was entered by a court lacking jurisdiction and was thus void.

Appeal from the District Court for Douglas County, GREGORY M. SCHATZ, Judge, on appeal thereto from the County Court for Douglas County, STEPHEN M. SWARTZ, Judge. Judgment of District Court vacated, and cause remanded with directions.

Paul John Hansen, pro se.

Margaret A. McDevitt and Karl Von Oldenburg, of Brumbaugh & Quandahl, P.C., L.L.O., for appellee.

IRWIN, CARLSON, and CASSEL, Judges.

CASSEL, Judge.

INTRODUCTION

This matter comes before us upon the motion for rehearing filed by Paul John Hansen in response to our summary affirmance. We granted the motion in part, relating only to Hansen's

claim that the county court lacked subject matter jurisdiction to confirm an arbitration award. We conclude that Nebraska's Uniform Arbitration Act commits such jurisdiction exclusively to the district court. Because the county court lacked jurisdiction, the appellate courts also lack jurisdiction.

BACKGROUND

MBNA America Bank, N.A. (MBNA), filed a complaint in the county court for Douglas County for judgment upon an arbitration award made pursuant to a contract between MBNA and Hansen. Hansen filed an answer admitting certain of MBNA's allegations, denying the remainder, and asserting three affirmative defenses, none of which addressed the issue before us on rehearing. After protracted proceedings in the county court, the court entered a summary judgment for MBNA.

Hansen appealed to the district court, where he filed a statement of errors asserting 18 errors, which generally pertained to Hansen's claims that he received inadequate notice of the county court proceedings, that there was a lack of evidence regarding the contract between MBNA and Hansen, that there was no evidence of an accounting ledger of MBNA supporting the debt, and that there were foundational issues regarding the evidence on summary judgment. The district court affirmed the judgment of the county court and remanded the cause to the county court for execution of the judgment.

Hansen perfected an appeal to this court, and shortly thereafter, he filed a motion to dismiss for lack of subject matter jurisdiction. Hansen again asserted that he was not given notice of the proceedings in county court. He also argued that he never had a contract with MBNA and that he did not owe MBNA money. Based on his arguments about notice in the county court, it appeared that Hansen was attempting to challenge personal jurisdiction or due process, and we overruled the motion for summary dismissal. Thereafter, we summarily affirmed the district court's decision.

Hansen timely filed a motion for rehearing. The motion stated that Hansen "motions the court to dismiss this case for lack of subject matter jurisdiction" and that he "motions the court to dismiss the action with prejudice based on the fact that

state law requires the arbitration to be confirmed only in a district court and not a county court as with this case." In the last paragraph of the conclusion, Hansen asserted that the county court lacked jurisdiction because the Uniform Arbitration Act specified that the district court shall have jurisdiction. We sustained the motion for rehearing in part and granted rehearing limited to the issue of subject matter jurisdiction. We requested and received supplemental briefing on this issue from both parties. Pursuant to authority granted to this court under Neb. Ct. R. of Prac. 11B(1) (rev. 2006), this case was ordered submitted without oral argument.

ASSIGNMENTS OF ERROR

In his initial appellate brief, Hansen assigned 20 errors. We need not set forth his assigned errors because the issue upon rehearing is limited solely to subject matter jurisdiction.

STANDARD OF REVIEW

[1] When a lower court lacks the authority to exercise its subject matter jurisdiction to adjudicate the merits of the claim, issue, or question, an appellate court also lacks the power to determine the merits of the claim, issue, or question presented to the lower court. *VanHorn v. Nebraska State Racing Comm.*, 273 Neb. 737, 732 N.W.2d 651 (2007).

[2] A jurisdictional question which does not involve a factual dispute is determined by an appellate court as a matter of law, which requires the appellate court to reach a conclusion independent of the lower court's decision. *Id.*

[3] A party may move for rehearing in an appellate court based upon any claimed mistakes or inaccuracies in statements of fact or law in the opinion, and any questions involved which the court is claimed to have failed to consider on the appeal. *McCray v. Nebraska State Patrol*, 271 Neb. 1, 710 N.W.2d 300 (2006); Neb. Ct. R. of Prac. 13D (rev. 2006).

ANALYSIS

[4-6] Subject matter jurisdiction is a court's power to hear and determine a case in the general class or category to which the proceedings in question belong and to deal with the general subject involved in the action before the court and the particular

question which it assumes to determine. *Rozsnyai v. Svacek*, 272 Neb. 567, 723 N.W.2d 329 (2006). Lack of subject matter jurisdiction may be raised at any time by any party or by the court sua sponte. *Betterman v. Department of Motor Vehicles*, 273 Neb. 178, 728 N.W.2d 570 (2007). Parties cannot confer subject matter jurisdiction upon a judicial tribunal by either acquiescence or consent, nor may subject matter jurisdiction be created by waiver, estoppel, consent, or conduct of the parties. *Cummins Mgmt. v. Gilroy*, 266 Neb. 635, 667 N.W.2d 538 (2003). Because absence of subject matter jurisdiction may be raised by any party at any time, we must consider the question even though it was first raised on rehearing.

[7] We start by setting forth the general principles relating to the respective jurisdiction of the district and county courts. Neb. Const. art. V, § 9, states in pertinent part: "The district courts shall have both chancery and common law jurisdiction, and such other jurisdiction as the Legislature may provide." The jurisdiction of the district courts conferred by the terms of the Nebraska Constitution, as thus conferred, is beyond the power of the Legislature to limit or control; while the Legislature may grant to the district courts such other jurisdiction as it may deem proper, it cannot limit or take away from such courts their broad and general jurisdiction which the constitution has conferred upon them. *Susan L. v. Steven L.*, 273 Neb. 24, 729 N.W.2d 35 (2007). In *Tynan v. Tate*, 3 Neb. 388 (1874), the Nebraska Supreme Court recognized "the common law mode of arbitration." Because it appears that arbitration falls within the district court's common law jurisdiction, the Legislature is powerless to take away the district court's jurisdiction over such matters.

[8] The Legislature granted district courts "general, original and appellate jurisdiction in all matters, both civil and criminal, except where otherwise provided." Neb. Rev. Stat. § 24-302 (Reissue 1995). A county court has concurrent original jurisdiction with the district court in all civil actions of any type when the amount in controversy is $51,000 or less. See, Neb. Rev. Stat. § 24-517(5) (Cum. Supp. 2006); Neb. Ct. R. of Cty. Cts. 62(I) (rev. 2005). Neither § 24-302 nor § 24-517 explicitly confers jurisdiction over arbitration to either the district court or

the county court. But assuming that at common law an action to enforce arbitration awards existed when the Legislature generally conferred jurisdiction on the county courts in matters where the amount in controversy is $51,000 or less, such an action may have been within the county court's jurisdiction.

The role of the court in the post-1987 arbitration process is specifically addressed and limited by the Uniform Arbitration Act. *Hartman v. City of Grand Island*, 265 Neb. 433, 657 N.W.2d 641 (2003). The Uniform Arbitration Act is found at Neb. Rev. Stat. § 25-2601 et seq. (Reissue 1995 & Cum. Supp. 2006). Section 25-2612 generally directs "the court" to confirm an arbitration award within 60 days of the application of a party unless timely grounds are asserted under either § 25-2613, for vacating an award, or under § 25-2614, for modifying or correcting an award. Section 25-2615 states that "[u]pon the granting of an order confirming, modifying, or correcting an award, a judgment or decree shall be entered in conformity therewith and should be enforced as any other judgment or decree." Section 25-2617 specifies that "[e]xcept as otherwise provided, an application to the court under the Uniform Arbitration Act shall be by motion and shall be heard in the manner and upon the notice provided by law or rule of court for the making and hearing of motions." All of these statutes refer to "the court."

[9-13] Section 25-2618(a) states, "The term court shall mean any district court of this state. The making of an agreement described in section 25-2602.01 providing for arbitration in this state confers jurisdiction on the court to enforce the agreement under the Uniform Arbitration Act and to enter judgment on an award thereunder." Appellate courts give statutory language its plain and ordinary meaning and will not resort to interpretation to ascertain the meaning of statutory words which are plain, direct, and unambiguous. *Knapp v. Village of Beaver City*, 273 Neb. 156, 728 N.W.2d 96 (2007). It is not within the province of a court to read a meaning into a statute that is not warranted by the language; neither is it within the province of a court to read anything plain, direct, and unambiguous out of a statute. *State v. Warriner*, 267 Neb. 424, 675 N.W.2d 112 (2004). If the language of a statute is clear, the words of such statute are the end of any judicial inquiry regarding its meaning. *Turco*

v. Schuning, 271 Neb. 770, 716 N.W.2d 415 (2006). Section 25-2618 expressly gives "any district court" jurisdiction over arbitration matters. Applying the legal principle of expressio unius est exclusio alterius—that the expression of one thing is the exclusion of the others—the express grant of jurisdiction to the district courts excludes jurisdiction to courts unmentioned by the statute. See, generally, *Chapin v. Neuhoff Broad.-Grand Island, Inc.*, 268 Neb. 520, 684 N.W.2d 588 (2004). The Legislature's specific grant of jurisdiction to the district court to the exclusion of the county court presents a potential conflict between §§ 25-2618 and 24-517(5) on the subject of jurisdiction. To the extent that a conflict exists between two statutes on the same subject, the specific statute controls over the general statute. *In re Application of Metropolitan Util. Dist.*, 270 Neb. 494, 704 N.W.2d 237 (2005). Accordingly, the Legislature's specific grant of jurisdiction in matters of arbitration to the district court is controlling.

[14] Our conclusion that the county court lacks jurisdiction is bolstered by § 25-2618.01(a), which empowers a party to submit a controversy, which controversy is subject to the terms of an otherwise valid arbitration agreement, to the small claims court when the amount of the controversy is within the small claims court's jurisdictional limit. It further provides that a controversy submitted to the small claims court under this section shall not be transferred to the regular docket of the county court under Neb. Rev. Stat. § 25-2805 (Cum. Supp. 2006). See § 25-2618.01(b). Thus, while the Legislature allowed for very small claims to be adjudicated in the small claims court rather than through arbitration, it is significant to the issue before us that such claims could not be removed to the regular docket of the county court. It therefore appears the Legislature contemplated that the county court would have no function with respect to enforcement of arbitration agreements or arbitration awards. We conclude that jurisdiction over confirmation of arbitration awards is conferred upon the district court by § 25-2618 and that the county court has no such jurisdiction.

[15] The last question we must consider is whether anything in the federal Arbitration Act, 9 U.S.C. § 1 et seq. (2000 & Supp. V 2005) preempts state law on the subject. The

Supremacy Clause of the U.S. Constitution dictates that state law, including constitutional law, is superseded to the extent it conflicts with federal law. U.S. Const. art. VI, cl. 2; *Dowd v. First Omaha Sec. Corp.*, 242 Neb. 347, 495 N.W.2d 36 (1993). With regard to the confirmation of an arbitration award, 9 U.S.C. § 9 provides:

> If the parties in their agreement have agreed that a judgment of the court shall be entered upon the award made pursuant to the arbitration, and shall specify the court, then at any time within one year after the award is made any party to the arbitration may apply to the court so specified for an order confirming the award, and thereupon the court must grant such an order unless the award is vacated, modified, or corrected as prescribed in sections 10 and 11 of this title. If no court is specified in the agreement of the parties, then such application may be made to the United States court in and for the district within which such award was made. Notice of the application shall be served upon the adverse party, and thereupon the court shall have jurisdiction of such party as though he had appeared generally in the proceeding. If the adverse party is a resident of the district within which the award was made, such service shall be made upon the adverse party or his attorney as prescribed by law for service of notice of motion in an action in the same court. If the adverse party shall be a nonresident, then the notice of the application shall be served by the marshal of any district within which the adverse party may be found in like manner as other process of the court.

We see nothing in the federal Arbitration Act which confers jurisdiction on Nebraska county courts or otherwise preempts state law. The arbitration agreement in this case stated in relevant part, "Judgment upon any arbitration award may be entered in any court having jurisdiction." Under Nebraska's statute, the only court having such jurisdiction is the district court. We conclude that the county court did not have jurisdiction to confirm the arbitration award. Accordingly, the district court and this court also lack jurisdiction over the merits of the appeal.

CONCLUSION

[16] Because the county court lacked the authority to exercise its subject matter jurisdiction to confirm the arbitration award, the district court and this court also lack the power to determine the merits of the issue presented to the county court. We withdraw our previous judgment of summary affirmance. Even though an appellate court may lack jurisdiction to hear the merits of the case, the appellate court does have authority to vacate a lower court's order, and, if appropriate, remand the case for further proceedings, when such order was entered by a court lacking jurisdiction and was thus void. *Goeser v. Allen*, 14 Neb. App. 656, 714 N.W.2d 449 (2006). We therefore vacate the decision of the district court, and remand the cause with directions that the district court is to remand the cause to the county court with instructions to dismiss the complaint for lack of subject matter jurisdiction. See *Merrill v. Griswold's, Inc.*, 270 Neb. 458, 703 N.W.2d 893 (2005).

JUDGMENT VACATED, AND CAUSE REMANDED WITH DIRECTIONS.

VICKI KING, SPECIAL ADMINISTRATRIX OF THE ESTATE OF BRADLEY B. KING, DECEASED, APPELLANT, V. BURLINGTON NORTHERN SANTA FE RAILWAY COMPANY, A DELAWARE CORPORATION, APPELLEE.

746 N.W.2d 383

Filed March 11, 2008. No. A-05-1520.

1. **Federal Acts: Railroads: Claims: Courts: Jurisdiction.** Courts of the United States and courts of the several states have concurrent jurisdiction over claims controlled by the Federal Employers' Liability Act.
2. **Federal Acts: Railroads: Claims: Courts.** In disposing of a claim controlled by the Federal Employers' Liability Act, a state court may use procedural rules applicable to civil actions in the state court unless otherwise directed by the act, but substantive issues concerning a claim under the Federal Employers' Liability Act are determined by the provisions of the act and interpretative decisions of the federal courts construing the Federal Employers' Liability Act.
3. **Jurisdiction.** Unlike substantive issues, procedural matters are governed by the law of the forum.

4. **Rules of Evidence.** In proceedings where the Nebraska rules of evidence apply, the admission of evidence is controlled by rule and not by judicial discretion, except where judicial discretion is a factor involved in assessing admissibility.
5. **Trial: Expert Witnesses: Appeal and Error.** A trial court's ruling in receiving or excluding an expert's testimony which is otherwise relevant will be reversed only when there has been an abuse of discretion.
6. **Judgments: Words and Phrases.** An abuse of discretion occurs when a trial court's decision is based upon reasons that are untenable or unreasonable or if its action is clearly against justice or conscience, reason, and evidence.
7. **Trial: Courts: Expert Witnesses.** Under *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 113 S. Ct. 2786, 125 L. Ed. 2d 469 (1993), and *Schafersman v. Agland Coop*, 262 Neb. 215, 631 N.W.2d 862 (2001), the trial court acts as a gatekeeper to ensure the evidentiary relevance and reliability of an expert's opinion.
8. **Courts: Expert Witnesses.** In determining the admissibility of an expert's testimony, a trial court may consider nonexclusive criteria in evaluating the reliability of a particular theory to include (1) whether the theory or technique can be, and has been, tested; (2) whether the theory or technique has been subjected to peer review and publication; (3) whether there is a known or potential rate of error; (4) whether there are standards controlling the technique's operation; and (5) whether the theory or technique enjoys general acceptance within the relevant scientific community.
9. **Physicians and Surgeons.** In performing a differential diagnosis, a physician begins by "ruling in" all scientifically plausible causes of the patient's injury. The physician then "rules out" the least plausible causes of injury until the most likely cause remains.
10. **Summary Judgment: Motions for Continuance: Appeal and Error.** A continuance authorized by Neb. Rev. Stat. § 25-1335 (Reissue 1995) is within the discretion of the trial court, whose ruling will not be disturbed on appeal in the absence of an abuse of discretion.

Appeal from the District Court for Douglas County: W. MARK ASHFORD, Judge. Affirmed.

Richard J. Dinsmore and Jayson D. Nelson, of Law Offices of Richard J. Dinsmore, P.C., for appellant.

Nichole S. Bogen and James A. Snowden, of Wolfe, Snowden, Hurd, Luers & Ahl, L.L.P., for appellee.

IRWIN, SIEVERS, and MOORE, Judges.

MOORE, Judge.

INTRODUCTION

This is a Federal Employers' Liability Act (FELA) case brought in the district court for Douglas County in which

Bradley B. King claimed that he contracted multiple myeloma due to his exposure to diesel exhaust during his 28-year employment with the Burlington Northern and Santa Fe Railway Company (BNSF). King died on April 9, 2002, and the matter was revived in the name of his wife, Vicki King, the administratrix of his estate. For the sake of simplicity, we hereinafter refer to Vicki King also as "King." The district court granted BNSF's motion in limine, excluding King's expert witness from testifying, and subsequently granted summary judgment in favor of BNSF. Because we find no abuse of discretion in the district court's rulings, we affirm.

BACKGROUND

King brought an action against BNSF under the FELA, 45 U.S.C. § 51 et seq. (2000), and the Locomotive Inspection Act, now codified at 49 U.S.C. § 20701 et seq. (2000). King alleged that he contracted multiple myeloma because of his exposure to diesel exhaust fumes while working for BNSF for 28 years. Multiple myeloma is a cancer affecting the plasma cell, and according to the Multiple Myeloma Research Foundation, although multiple myeloma is treatable, it is an incurable disease. See, generally, Multiple Myeloma Research Foundation, About Myeloma, http://www.multiplemyeloma.org/about_myeloma/index.php (last visited Jan. 2, 2008). In his first amended petition, King sought judgment against BNSF on his first and second causes of action for present special damages of $128,000, future special damages, any and all general damages allowed by law, and costs.

On June 22, 2005, BNSF filed a motion in limine and for summary judgment. BNSF sought exclusion of King's expert witness, Dr. Arthur Frank, alleging that Frank was unqualified to render an opinion as to the cause of King's multiple myeloma because his opinion was based on subjective beliefs and unsupported speculation without basis in scientific standards and was based on insufficient facts or data in contravention of the standard for admissibility of expert testimony.

At the hearing on BNSF's motion in limine, the district court received various exhibits, including two depositions of King, a deposition of Frank, a deposition of BNSF's expert,

and numerous medical articles relied on by the parties' experts. Because the depositions, as well as the medical literature, relied on by the parties are quite voluminous, we only set forth the general arguments presented to the district court in this portion of our opinion and only that portion of Frank's testimony necessary to our resolution of this appeal in the analysis section below. King offered the testimony of Frank to support the allegation that King's exposure to diesel exhaust while working for BNSF was the cause of King's multiple myeloma. BNSF offered the expert testimony of a different doctor, who opined that diesel exhaust does not cause multiple myeloma. BNSF argued that Frank's expert medical opinion was unreliable and, thus, not admissible. Specifically, BNSF argued that neither the medical or scientific community nor any medical or scientific literature supported Frank's opinion. Conversely, King argued that Frank's opinion met the reliability standards set forth in Nebraska case law and that thus, a fact finder should determine the credibility of Frank's opinion. After reviewing the evidence, briefs, and arguments of the parties, the district court concluded that Frank should be excluded from testifying, and it entered an order on October 21, 2005, granting BNSF's motion in limine. We have set forth the specific details of the reasoning employed by the court in reaching its decision in the analysis section below.

On November 16, 2005, counsel for the parties appeared before the district court for a further hearing, upon BNSF's motion for summary judgment. The court heard arguments from counsel and also considered the evidence previously received at the hearing on the motion in limine. The court also received a written motion from King for additional time to designate expert witnesses and heard arguments in connection with that motion. On November 23, the court entered an order granting BNSF's motion for summary judgment and denying King's motion for additional time to designate expert witnesses. The court found that BNSF had satisfied its burden of adducing evidence demonstrating that there was no causal connection between King's employment, including his exposure to diesel exhaust, and his subsequent development of multiple myeloma. Because King had not satisfied the burden of producing evidence sufficient

to demonstrate that a genuine dispute of material fact existed, the court granted BNSF's motion for summary judgment. This timely appeal followed.

ASSIGNMENTS OF ERROR

King asserts that the district court erred in (1) excluding Frank's testimony and (2) failing to allow King to obtain other expert testimony after disallowing Frank's testimony.

STANDARD OF REVIEW

[1-3] Courts of the United States and courts of the several states have concurrent jurisdiction over claims controlled by FELA. *Wagner v. Union Pacific RR. Co.*, 11 Neb. App. 1, 642 N.W.2d 821 (2002). In disposing of a claim controlled by FELA, a state court may use procedural rules applicable to civil actions in the state court unless otherwise directed by FELA, but substantive issues concerning a claim under FELA are determined by the provisions of FELA and interpretative decisions of the federal courts construing FELA. *Id.* Unlike substantive issues, procedural matters are governed by the law of the forum. *Id.*

[4-6] In proceedings where the Nebraska rules of evidence apply, the admission of evidence is controlled by rule and not by judicial discretion, except where judicial discretion is a factor involved in assessing admissibility. *Epp v. Lauby*, 271 Neb. 640, 715 N.W.2d 501 (2006). A trial court's ruling in receiving or excluding an expert's testimony which is otherwise relevant will be reversed only when there has been an abuse of discretion. *Id.* An abuse of discretion occurs when a trial court's decision is based upon reasons that are untenable or unreasonable or if its action is clearly against justice or conscience, reason, and evidence. *Id.*

ANALYSIS

Exclusion of Frank's Testimony.

King alleges that as a result of his exposure to diesel exhaust during his 28 years of employment by BNSF, he developed multiple myeloma. On appeal, King asserts that the district court erred in excluding Frank's testimony regarding the causation of King's multiple myeloma. In evaluating the court's

ruling on BNSF's motion in limine, we must consider, under our abuse of discretion standard, whether there was sufficient evidence presented to allow Frank to opine that exposure to diesel exhaust was the cause of King's multiple myeloma.

[7] Rule 702 of the Nebraska Evidence Rules governs the admissibility of expert opinion testimony. See Neb. Rev. Stat. § 27-702 (Reissue 1995). Under *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 113 S. Ct. 2786, 125 L. Ed. 2d 469 (1993), and *Schafersman v. Agland Coop*, 262 Neb. 215, 631 N.W.2d 862 (2001), the trial court acts as a gatekeeper to ensure the evidentiary relevance and reliability of an expert's opinion. *Epp v. Lauby, supra*. The Nebraska Supreme Court has described a trial court's evaluation of the admissibility of expert testimony as essentially a four-step process, stating:

> First, the court must determine whether the witness is qualified to testify as an expert. If the expert is and it is necessary for the court to conduct a *Daubert* analysis, the court must next determine whether the reasoning or methodology underlying the expert testimony is scientifically valid and reliable. Once the reasoning or methodology has been found to be reliable, the court must next determine whether the methodology was properly applied to the facts in issue. Finally, the court determines whether the evidence and opinions related thereto are more probative than prejudicial, as required under Neb. Evid. R. 403, Neb. Rev. Stat. § 27-403 (Reissue 1995).

Epp v. Lauby, 271 Neb. at 646-47, 715 N.W.2d at 508.

[8] In determining the admissibility of an expert's testimony, a trial court may consider nonexclusive criteria in evaluating the reliability of a particular theory to include (1) whether the theory or technique can be, and has been, tested; (2) whether the theory or technique has been subjected to peer review and publication; (3) whether there is a known or potential rate of error; (4) whether there are standards controlling the technique's operation; and (5) whether the theory or technique enjoys general acceptance within the relevant scientific community. *Epp v. Lauby, supra*.

The district court found there was no question that Frank was eminently qualified to give expert medical testimony. However,

the court found that Frank's opinion was not based on reliable methodology and, thus, excluded Frank from testifying for King. Frank opined that King's exposure to diesel exhaust fumes, which contain benzene, a known carcinogen, over a 28-year period of working for BNSF caused King to contract multiple myeloma. Frank reached this conclusion by examining the "'totality of the information available regarding multiple myeloma, benzene and diesel exhaust.'" In Frank's opinion, a person exposed to diesel exhaust and benzene above a base level over an extended period of time can be expected to be at risk to contract multiple myeloma because as the level of exposure increases, the risk increases. Given the length of time King was exposed to diesel exhaust, Frank concluded to a reasonable degree of medical certainty that this exposure was the cause of King's multiple myeloma.

In King's brief on appeal, numerous studies relied on by Frank to support his opinion are cited. King similarly cited such studies to the district court, which concluded that Frank's reliance on the "'totality of information regarding multiple myeloma, benzene and diesel exhaust'" in opining diesel exhaust exposure causes multiple myeloma was not reliable and that Frank's testimony was thus not admissible under rule 702 and the standards set forth in *Daubert* and *Schafersman*. The district court observed that Frank's methodology in reaching his conclusion that exposure to diesel exhaust is a risk factor in causing multiple myeloma was specifically rejected by one court applying the same *Daubert* standards to determine admissibility of expert testimony. See *Missouri Pacific R. Co. v. Navarro*, 90 S.W.3d 747 (Tex. App. 2002). In *Navarro*, the court rejected one expert's opinion, that a railroad employee contracted multiple myeloma through her exposure to diesel exhaust, after the court concluded that the expert's methodology was flawed.

In *Navarro*, that expert based his conclusion on two studies dealing with diesel exhaust and multiple myeloma. However, the *Navarro* court, discussing one study, stated that it was impossible to tell whether the railroad workers in that study who died from multiple myeloma were even exposed to diesel exhaust and that the study noted that because there were only three such

deaths, there was no statistically significant relationship between railroad workers' diesel exhaust exposure and multiple myeloma. The *Navarro* court also noted that the second study did not conclude that diesel exhaust exposure caused multiple myeloma. That expert also acknowledged that other studies concluded that there was no relationship between multiple myeloma and diesel exhaust, but he testified that he rejected those studies. The *Navarro* court noted that although the expert based his opinion on two studies, he chose to ignore the studies' conclusions and instead reached his own conclusion based on the data contained in those studies. The court also rejected the expert's opinion because he was unable to state the level of exposure required and was not involved in any research or publications dealing with diesel exhaust exposure and multiple myeloma. *Id.*

The *Navarro* court further stated that all of the plaintiff's expert witnesses who testified that diesel exhaust exposure causes multiple myeloma were unreliable. The court stated that the experts' opinions were subjective because they were not supported by any studies, the methodology the experts employed to reach their conclusions had no known potential rate of error, and the experts' opinions were not generally accepted in the scientific community. The court pointed out that the plaintiff's experts were "alone in the scientific community in their opinions that exposure to diesel exhaust causes multiple myeloma." *Id.* at 758.

In the present case, the district court concluded that Frank offered the same opinion, based on the same methodology that was rejected in *Navarro*. The court found that like the experts in *Navarro*, Frank could not point to a study that concluded exposure to diesel exhaust causes multiple myeloma. The court further found that Frank could not state the level of exposure to diesel exhaust that creates a risk for multiple myeloma. The court observed that Frank was not directly involved in any research or studies dealing with diesel exhaust exposure and multiple myeloma and that he had simply relied on the "'totality of information regarding multiple myeloma, benzene and diesel exhaust'" to reach his own subjective conclusions regarding diesel exhaust exposure and multiple myeloma. The court noted, as did the court in *Navarro*, that such method had

no known rate of error and resulted in a subjective opinion that was not supported by any studies or accepted within the scientific or medical community.

In *Schafersman v. Agland Coop*, 262 Neb. 215, 222, 631 N.W.2d 862, 871 (2001), the case in which the Nebraska Supreme Court adopted the *Daubert* standard, the court rejected expert opinion testimony that relied on "multiple mineral toxicity," a theory that was not generally accepted or recognized in any scientific field. The *Schafersman* court had concluded under a former test based on *Frye v. United States*, 293 F. 1013 (D.C. Cir. 1923), that an expert's opinion that "multiple mineral toxicity" affected cows' ability to produce milk was not reliable and thus not admissible because multiple mineral toxicity was not a generally accepted theory. 262 Neb. at 222, 631 N.W.2d at 871. In *Schafersman*, the court noted that the expert had neither studied "multiple mineral toxicity" nor authored any publications concerning it, had cited no controlled studies related to that theory, and also had conceded that there was no standard to determine what levels of minerals would cause a toxic effect on the cows. 262 Neb. at 221, 631 N.W.2d at 869.

On a subsequent appeal following remand for a new trial in which the *Daubert* standard was applied, the Nebraska Supreme Court found it unnecessary to consider whether the expert's revised theory of multiple mineral toxicity was reliable under *Daubert*. In its opinion, see *Schafersman v. Agland Coop*, 268 Neb. 138, 681 N.W.2d 47 (2004), the Nebraska Supreme Court noted that the lack of independent hard scientific support for multiple mineral toxicity was not the only reason the trial court gave for excluding the plaintiffs' experts. The trial court also excluded the experts because they had failed to perform a reliable clinical analysis, specifically noting that none had conducted a differential diagnosis. The Nebraska Supreme Court found that the plaintiffs' experts had not taken any substantive steps to shore up the weaknesses previously identified in the clinical analysis and accordingly found that the trial court did not abuse its discretion in refusing to admit the expert opinion testimony of the plaintiffs' witnesses.

The district court in this case noted that a federal circuit court of appeals applying the *Daubert* standard recently rejected

expert opinion testimony based on methodology similar to that employed by Frank. In *McClain v. Metabolife Intern., Inc.*, 401 F.3d 1233 (11th Cir. 2005), an expert testified that the ephedrine combined with caffeine in a weight-loss product caused heart attacks because ephedrine was classified within a drug family that causes blood vessel constriction and increased pulse rate and blood pressure, which over the long term can lead to narrowing and inflammation of the blood vessels, which can lead to heart attacks and strokes. The court ruled the opinion inadmissible because it was speculative and because the expert unjustifiably relied on consumer and government reports and inferred conclusions from studies and reports not authorized by those studies and reports. *Id*. The court also rejected the expert's opinion because he based his conclusion on a comparison of ephedrine and its symptoms to another, similar drug, phenylpropanolamine, and its symptoms. The court stated that such "'[s]ubjective speculation . . .' does not provide good grounds for the admissibility of expert opinions." *Id.* at 1245. The *McClain* court further noted that the expert's reliance on medical studies and reports was not justified, because the studies and reports did not authorize his opinions. For example, although the expert concluded that ephedrine, when mixed with caffeine, was the cause of heart attacks and strokes, the studies merely concluded that such a mix "'in some patients may cause toxicity'" and only "'could increase the risk of adverse effects.'" *Id.* at 1247 (emphasis omitted).

In this case, the district court found Frank's methodology to be similarly flawed. The court observed that Frank pointed to numerous studies, some of which dealt with exposure to diesel exhaust or benzene and to multiple myeloma, yet he could not point to a single study that conclusively stated that exposure to diesel exhaust or benzene causes multiple myeloma. The court noted that one study relied on by Frank stated that diesel exhaust "'may be a risk factor,'" while another study stated that "'some studies of (engine exhaust) did show a significant association with multiple myeloma.'" However, the district court found that no study relied on by Frank reached the same conclusion as Frank. The court concluded that ultimately, Frank combined the data contained in the studies to reach his own

speculative and subjective conclusion that diesel exhaust exposure causes multiple myeloma.

In short, the district court found that Frank's opinion was not reliable because his opinion was based on his own subjective conclusions and flawed methodology, because no medical or scientific study had concluded that diesel exhaust exposure causes multiple myeloma, and because the underlying methodology of Frank's opinion was unreliable. It concluded that his testimony was thus not admissible under the Nebraska Evidence Rules and expert testimony reliability standards established in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 113 S. Ct. 2786, 125 L. Ed. 2d 469 (1993), and *Schafersman v. Agland Coop*, 262 Neb. 215, 631 N.W.2d 862 (2001).

[9] Both before the district court and on appeal to this court, King argues that Frank engaged in a differential diagnosis or differential etiology, which the district court noted is a standard scientific technique under which a medical condition is diagnosed by eliminating all the likely causes until the most probable one is isolated. The technique has been accepted in the medical community, and its use has been upheld in both federal and Nebraska courts. See, *Carlson v. Okerstrom*, 267 Neb. 397, 675 N.W.2d 89 (2004); *Boren v. Burlington Northern & Santa Fe Ry. Co.*, 10 Neb. App. 766, 637 N.W.2d 910 (2002). In *Carlson*, the Nebraska Supreme Court emphasized that an expert's opinion is not admissible simply because the expert conducted a differential diagnosis, but that the court must determine whether the expert conducted a reliable differential diagnosis. In performing a differential diagnosis, a physician begins by "ruling in" all scientifically plausible causes of the patient's injury. *Id.* The physician then "rules out" the least plausible causes of injury until the most likely cause remains. *Id.*

> In analyzing the second step of a differential diagnosis under the *Daubert/Schafersman* framework, the question is whether the expert had a reasonable basis for concluding that one of the plausible causative agents was the most likely culprit for the patient's symptoms. In other words, the expert must be able to show good grounds for eliminating other potential hypotheses.

Carlson, 267 Neb. at 414, 675 N.W.2d at 106.

In *Carlson*, the court concluded that an expert's opinion, that a neurogenic bladder condition suffered by one of the plaintiffs was caused by an impact to the abdominal area of his body in a traffic accident, was based on a reliable differential diagnosis. The expert originally did not have an opinion as to the cause of the condition, but only ruled out infection. After reviewing the medical examinations of other doctors, the expert ruled out other causes such as a urinary tract obstruction, spinal cord injury, and multiple sclerosis. When the expert reexamined the plaintiff, he found that the plaintiff had an enlarged prostate, which condition had developed 4 years after the initial bladder problems. The expert concluded that the plaintiff suffered from enlarged prostate and neurogenic bladder. The expert then concluded that the cause of the neurogenic bladder condition was the automobile accident because the condition developed within weeks of the accident. The *Carlson* court noted that the expert ruled out other causes based on his own physical examination of the plaintiff, along with examinations conducted by other doctors. The court concluded that the differential diagnosis was reliable because the expert relied on the temporal connection between the symptoms and the accident, and it was undisputed that such trauma was capable of causing neurogenic bladder. *Id.*

Unlike the *Carlson* case, where the parties did not dispute that trauma could cause the condition at issue or whether the expert had properly ruled in potential causes of the injury, the present appeal concerns whether exposure to diesel exhaust can be a possible cause of multiple myeloma. The district court found "no evidence that . . . Frank considered any other potential causes of . . . King's multiple myeloma, why those potential causes were eliminated and why . . . King's exposure to diesel exhaust is the most probable cause." In his deposition, Frank was asked if he employed the process of ruling in and ruling out either known causes or known risk factors in making his opinions or judgments with respect to etiology. Frank responded "[y]es" without further explanation. Elsewhere in his deposition, Frank noted exposure to radiation as a possible cause, but he found no evidence of any unusual exposure to radiation. Frank stated, however, that there were no possible associations of multiple myeloma with chemicals that he researched in

connection with King's illness other than the association with diesel exhaust. Frank also found articles with respect to associations of multiple myeloma and smoking, which "all appeared to be negative" associations. Frank made no specific comparison of associations between diesel exhaust and multiple myeloma and associations between smoking and multiple myeloma. Frank was asked if there was an association with farmwork, and he agreed that there was some association between multiple myeloma and exposure to pesticides. Similarly, Frank made no specific comparisons between that association and the associations with exposure to diesel exhaust. Frank noted a possible connection with diabetes as well, but stated it was not relevant in King's case because "it's not a disease that he had." Frank agreed that King had worked on a farm at one point in his life and that in working on a farm, he would have had the possibility of working with pesticides.

The district court determined that Frank's differential diagnosis was not reliable. The court determined that the record did not show what causes other then diesel exhaust exposure Frank considered in his differential diagnosis. The court further determined that in the first step of the differential diagnosis, Frank "'ruled in'" diesel exhaust exposure as a possible cause, even though no medical or scientific study concluded that such exposure causes multiple myeloma. Finally, the court determined that in the second step, Frank did not state why he "'ruled out'" any other potential causes, but merely concluded that diesel exhaust exposure was most probable—again, even though no medical or scientific study authorizes such a conclusion.

King argues that this court has previously accepted Frank's opinion based on a differential diagnosis. See *Boren v. Burlington Northern & Sante Fe Ry. Co.*, 10 Neb. App. 766, 637 N.W.2d 910 (2002). In *Boren*, Frank used a differential diagnosis to conclude that a plaintiff's exposure to various chemicals caused him to contract cirrhosis. However, in *Boren*, Frank and another expert testified that medical journals and peer-reviewed articles "indicated that exposure to the various chemicals involved . . . can cause cirrhosis." 10 Neb. App. at 776, 637 N.W.2d at 920. In *Boren*, Frank also testified that the plaintiff was exposed to various chemicals over a period of years, that such exposure

could cause medical problems, and that there was evidence to rule out other causes. He also testified that the plaintiff had acute reactions to the chemicals on numerous occasions, such as skin reactions, breathing problems, and headaches. *Id.*

In the present case, the district court concluded that although differential diagnosis is a generally accepted methodology, Frank had not performed a reliable differential diagnosis. The court further concluded that because Frank's opinion was not based on reliable methodology, his testimony must be excluded under the Nebraska Evidence Rules and expert testimony reliability standards established in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 113 S. Ct. 2786, 125 L. Ed. 2d 469 (1993), and *Schafersman v. Agland Coop*, 262 Neb. 215, 631 N.W.2d 862 (2001).

Having reviewed the record, including the district court's well-reasoned opinion and Frank's deposition testimony, and the relevant case law, we find no abuse of discretion in the district court's decision to grant BNSF's motion in limine and exclude Frank's testimony.

Other Expert.

King asserts that the district court erred in failing to allow King to obtain other expert testimony after disallowing Frank's testimony. King states that the motion for additional time to designate expert witnesses was filed because the court failed to set out with sufficient particularity its reasoning in determining that Frank's differential diagnosis or etiology was deficient. We note that the district court wrote a 10-page opinion explaining its reasoning in support of its order granting the motion for limine. King argues that BNSF would not have been prejudiced had the court granted King's motion, since King was deceased by that point and there was no issue of ongoing damages. In denying the motion during proceedings on November 16, 2005, the court stated:

> I will just say that I think I spent a good deal of time trying to make my order very clear. I don't think it was exceedingly complicated. I think the science was such that it required me to make such a decision, and that's about all I'll say on it.

Therefore, the motion for additional time to designate an expert witness is denied.

[10] At the November 16, 2005, hearing on BNSF's motion for summary judgment, which occurred subsequently to the hearings on the motion in limine and issuance of the district court's ruling thereon, the court indicated that it had just received King's motion for additional time. In essence, King sought a continuance of the summary judgment hearing. A continuance authorized by Neb. Rev. Stat. § 25-1335 (Reissue 1995) (continuance of summary judgment hearing for further discovery) is within the discretion of the trial court, whose ruling will not be disturbed on appeal in the absence of an abuse of discretion. *Newman v. Thomas*, 264 Neb. 801, 652 N.W.2d 565 (2002). There is not a copy of the original petition in our record, but the operative petition was filed in December 2001. Clearly, the case had been at issue for quite some time by the time of the November 16, 2005, hearing. The record does not contain a copy of King's motion for additional time, and there is nothing in the bill of exceptions for the November 16 hearing to indicate that King had identified any possible experts other than Frank who might testify as to the causation of King's multiple myeloma. The initial hearing on BNSF's motion in limine and motion for summary judgment was held on July 20, 2005, and the possible need for an additional expert witness in the event that BNSF prevailed on the motion in limine would have been apparent at that time, months before King's motion for additional time. We find no abuse of discretion in the court's denial of King's motion.

CONCLUSION

The court did not abuse its discretion in granting the motion in limine to exclude Frank's testimony or in denying King's motion for additional time to designate expert witnesses.

AFFIRMED.

VIVIAN L. WILLS, APPELLEE, V.
RUSSELL C. WILLS, APPELLANT.
745 N.W.2d 924

Filed March 11, 2008. No. A-06-1161.

1. **Statutes: Judgments: Appeal and Error.** Statutory interpretation presents a question of law. When reviewing questions of law, an appellate court has an obligation to resolve the questions independently of the conclusion reached by the trial court.
2. **Courts: Statutes: Intent.** An appellate court properly looks to the official comments contained in a model act on which a Nebraska statute or series of statutes was patterned for some guidance in an effort to ascertain the intent of the legislation.
3. **Statutes.** A court must look to a statute's purpose and give to the statute a reasonable construction which best achieves that purpose, rather than a construction which would defeat it.
4. **States: Child Support.** Under Neb. Rev. Stat. § 42-746(d) (Reissue 2004), the law of the state which issued the initial controlling order governs the duration of the obligation of support.

Appeal from the District Court for Frontier County: DAVID URBOM, Judge. Affirmed as modified.

James C. Bocott, of McCarthy & Moore, for appellant.

No appearance for appellee.

INBODY, Chief Judge, and IRWIN and CASSEL, Judges.

CASSEL, Judge.

INTRODUCTION

The district court determined that under the Uniform Interstate Family Support Act (UIFSA) it had the authority to modify a New Mexico divorce decree to extend the duration of child support, measured by the age of majority, from age 18 (New Mexico) to age 19 (Nebraska). The court extended the child support owed by Russell C. Wills by 1 year. We determine that the court erred in statutory interpretation, and we modify the judgment to preserve the original duration of support.

BACKGROUND

On July 10, 1992, a district court for New Mexico dissolved the marriage between Russell and Vivian L. Wills. Pursuant

to the divorce decree, Vivian was awarded "primary physical custody" of the parties' three minor children and Russell was ordered to pay child support until the minor children married, reached the age of majority, or otherwise became emancipated. The age of majority in New Mexico at the time of the decree was 18 years of age. At some point after the entry of the New Mexico decree, the parties and their minor children moved to Nebraska.

In March 2006, Vivian registered the New Mexico decree in the district court for Frontier County. On March 27, she filed a motion to modify the amount of the child support obligation for the two younger children, who were born in November 1988, asserting a material change in circumstances in that Russell's disposable income had increased.

Based on stipulated facts, the district court entered an order on August 31, 2006, modifying both the amount and duration of the child support originally ordered in the New Mexico divorce decree. The court determined that the requirements for a modification in Neb. Rev. Stat. § 42-746 (Reissue 2004) did not apply because Neb. Rev. Stat. § 42-747.01 (Reissue 2004) was applicable. The court found that it had exclusive continuing jurisdiction and that the decree was subject to modification using Nebraska substantive law.

Russell timely appeals. Pursuant to authority granted to this court under Neb. Ct. R. of Prac. 11B(1) (rev. 2006), this case was ordered submitted without oral argument.

ASSIGNMENT OF ERROR

Russell alleges that the court erred in modifying the duration of child support under the UIFSA because the duration of child support was determined by the age of majority and was nonmodifiable under the laws of both states.

STANDARD OF REVIEW

[1] Statutory interpretation presents a question of law. When reviewing questions of law, an appellate court has an obligation to resolve the questions independently of the conclusion reached by the trial court. *Mathews v. Mathews*, 267 Neb. 604, 676 N.W.2d 42 (2004).

ANALYSIS

As the Nebraska Supreme Court has previously explained:

> The general purpose of UIFSA is to unify state laws relating to the establishment, enforcement, and modification of child support orders. . . . The goal of UIFSA is to streamline and expedite interstate enforcement of support decrees and to eliminate the problems arising from multiple or conflicting support orders from various states by providing for one tribunal to have continuing and exclusive jurisdiction to establish or modify a child support order. . . . UIFSA provides a system where only one child support order may be in effect at any one time. . . . UIFSA allows, under certain circumstances, a Nebraska court to . . . modify a support order issued in another state . . . .

Hamilton v. Foster, 260 Neb. 887, 899, 620 N.W.2d 103, 114 (2000).

The specific question presented in this appeal is whether the Nebraska court, the registering tribunal under UIFSA, has authority to modify the duration of child support determined by the New Mexico court as the issuing tribunal.

In Nebraska, the age of majority is 19. See Neb. Rev. Stat. § 43-2101 (Reissue 2004). The district court determined, and Russell does not dispute, that the age of majority in New Mexico is 18. See N.M. Stat. Ann. § 28-6-1 (Michie 2000).

The district court determined, and Russell agrees, that § 42-747.01 applies to the instant case. Section 42-747.01 states:

> (a) If all of the parties who are individuals reside in this state and the child does not reside in the issuing state, a tribunal of this state has jurisdiction . . . to modify the issuing state's child support order in a proceeding to register that order.
>
> (b) A tribunal of this state exercising jurisdiction under this section *shall apply the provisions of sections* 42-701 to 42-713.02 and *42-736 to 42-747.03 and the* procedural and *substantive law of this state* to the . . . modification proceeding. Sections 42-714 to 42-735 and 42-748 to 42-750 do not apply.

(Emphasis supplied.)

The district court focused on the language in § 42-747.01(b) directing the court to apply Nebraska substantive law. As Nebraska substantive law specifies age 19 as the age of majority, the court determined that § 42-747.01 authorized the court to modify the duration of support to that age. The court stated that "[t]he requirements for a modification set forth in [§] 42-746 do not apply because [§] 42-747.01 is applicable to this case."

Russell, however, emphasizes the listed sections and contends that § 42-747.01(b) also requires the court to apply § 42-746(c) and (d), as they fall within the specified range. Section 42-746 states, in pertinent part:

> (c) Except as otherwise provided in section 42-747.03, a tribunal of this state shall not modify any aspect of a child support order that cannot be modified under the law of the issuing state, including the duration of the obligation of support. . . .
>
> (d) In a proceeding to modify a child support order, the law of the state that is determined to have issued the initial controlling order governs the duration of the obligation of support. The obligor's fulfillment of the duty of support established by that order precludes imposition of a further obligation of support by a tribunal of this state.

Russell argues that the duration of a child support order could not be modified under New Mexico law and that the Nebraska court was also precluded from modifying the duration of the support order. He also contends that New Mexico law controls the duration of his support obligation.

[2,3] Despite a basic difference in the nature of the case, we rely upon the decision in *Groseth v. Groseth*, 257 Neb. 525, 600 N.W.2d 159 (1999), for guiding principles. The *Groseth* parties were divorced in Massachusetts and resided respectively in Texas and Nebraska. In the instant case, both parties reside in Nebraska. Thus, while in *Groseth* there remained a matter of interstate concern as between Texas and Nebraska, no such matter exists in the instant case. Nonetheless, we draw three important lessons from the *Groseth* decision. First, we properly look to the official comments contained in a model act on which a Nebraska statute or series of statutes was patterned for

some guidance in an effort to ascertain the intent of the legislation. *Id.* Second, dicta in *Groseth* supports our interpretation. Third, a court must look to a statute's purpose and give to the statute a reasonable construction which best achieves that purpose, rather than a construction which would defeat it. *Id.*

The official comments to the model act support our interpretation. The Nebraska Legislature closely followed the changes to the UIFSA model act, adopting the 1996 UIFSA amendments in 1997 and importing the 2001 UIFSA changes in 2003. See, 2003 Neb. Laws, L.B. 148; 1997 Neb. Laws, L.B. 727. Section 42-747.01 precisely tracks Unif. Interstate Family Support Act § 613, 9 U.L.A. 261 (2005), which was a new section included in the 1996 UIFSA amendments. The 1996 comment to § 613, which we quote at length, speaks directly to the purpose of § 42-747.01:

> The comment to Section 611(e) in the 1992 version of UIFSA contains the following statement: "Finally, note that if the parties have left the issuing state and now reside in the same state, this section is not applicable. Such a fact situation does not present an interstate matter and UIFSA does not apply. Rather, the issuing state has lost its continuing, exclusive jurisdiction and the forum state, as the residence of the parties, should apply local law without regard to the interstate Act."
>
> The intent of the comment was to state what seemed at the time to the Drafting Committee to be obvious; an action between two citizens of the same state is not a matter for interstate concern or application. A significant number of knowledgeable commentators, however, found the statement in the comment to be wholly inadequate. After all, the commentary is not substantive law, but rather merely expresses an interpretive opinion of the drafters of the Act. On reflection, the Drafting Committee decided that the critics were correct; the Act should deal explicitly with the possibility that the parties and the child no longer reside in the issuing state and that the individual parties have moved to the same new state. . . .
>
> This section is designed to make it clear that when the issuing state no longer has continuing, exclusive

> jurisdiction and the obligor and obligee reside in the same state, a tribunal of that state has jurisdiction to modify the child support order and assume continuing, exclusive jurisdiction. . . .
>
> Finally, because modification of the child support order when all parties reside in the forum is essentially an intrastate matter, Subsection (b) withdraws authority to apply most of the substantive and procedural provisions of UIFSA . . . . *Note, however, that the provision in Section 611(c)* [*§ 42-746(c)*] *forbidding modification of nonmodifiable aspects of the controlling order applies. For example, the duration of the support obligation remains fixed despite the subsequent residence of all parties in a new state with a different duration of child support*.

(Emphasis supplied.) Unif. Interstate Family Support Act § 613, comment, 9 U.L.A. 454 (2005). A comment to the 2001 amendments enlarges on this explanation, stating:

> The fact that the State of the new controlling order has a different duration of for [sic] child support is specifically declared to be irrelevant by UIFSA, see Section 611, *supra*. Note that the even-handed approach of the Act is sustained; neither an increase nor a decrease in the duration in the obligation of child support is permitted.

Unif. Interstate Family Support Act § 613, comment, 9 U.L.A. 261 (2005). This comment refers to the 2001 amendment to UIFSA § 611 adding a new section (d), which was, in turn, adopted essentially verbatim by the Nebraska Legislature as the current § 42-746(d). Section 42-476(c) was also amended to expressly refer to the duration of the obligation of support as an aspect that cannot be modified under the law of the issuing state.

The dicta in *Groseth v. Groseth*, 257 Neb. 525, 600 N.W.2d 159 (1999), anticipated the 2001 UIFSA amendments. In describing the purpose of § 42-747.01, the Nebraska Supreme Court quoted the comment regarding the interpretation initially deemed "'obvious'" by the UIFSA Drafting Committee. The court also provided an example suggesting that where the law of the states differed on the age of majority, modification by the forum state could not affect the duration of the support order.

[4] In light of the history of the 1996 and 2001 amendments to UIFSA (adopted by the Legislature in 1997 and 2003, respectively), the purpose of the statute is clear. Section 42-746(d) declares that the law of the state which issued the initial controlling order governs the duration of the obligation of support. The district court recognized that the law of New Mexico provides for support to terminate at age 18. As New Mexico issued the initial controlling order, its law governs the duration of Russell's support obligation. The district court erred in extending Russell's child support by the additional year.

CONCLUSION

Under the 1996 and 2001 amendments to UIFSA, the law of New Mexico, as the state which issued the initial controlling order, governs the duration of Russell's support obligation. To the extent that the district court's order of modification purported to change the duration of support, it is modified to conform to the provision of the original New Mexico decree continuing child support until such time as the children "are married, reaches [sic] majority or [are] otherwise emancipated." Under the governing law of New Mexico, a child reaches majority when he or she attains the age of 18 years. As so modified, we affirm the final order of the district court.

AFFIRMED AS MODIFIED.

RHONDA L. GEBHARDT, APPELLANT, V.
JOHN O. GEBHARDT, APPELLEE.
746 N.W.2d 707

Filed March 11, 2008. No. A-07-102.

1. **Jurisdiction: Appeal and Error.** Before reaching the legal issues presented for review, it is the duty of an appellate court to determine whether it has jurisdiction over the matter before it.
2. ____: ____. Notwithstanding whether the parties raise the issue of jurisdiction, an appellate court has a duty to raise and determine the issue of jurisdiction sua sponte.
3. **Pleadings: Judgments: Time.** Neb. Rev. Stat. § 25-1329 (Cum. Supp. 2006) requires the filing of a motion to alter or amend no later than 10 days after the entry of the judgment.

4. **Pleadings: Judgments: Time: Appeal and Error.** Under Neb. Rev. Stat. § 25-1912(3) (Cum. Supp. 2006), a motion to alter or amend timely filed terminates the running of the time for filing a notice of appeal as to all parties.
5. **Pleadings: Judgments: Time.** In order to be a tolling motion, a motion to alter or amend must seek substantive alteration of the judgment.
6. **Judgments: Final Orders: Words and Phrases.** According to Neb. Rev. Stat. § 25-1301(1) (Cum. Supp. 2006), a judgment is the final determination of the rights of the parties in an action; to be final, an order must dispose of the whole merits of the case and leave nothing for further consideration of the court, and thus the order is final when no further action of the court is required to dispose of the pending cause.
7. **Pleadings: Judgments: Appeal and Error.** Successive motions to alter or amend do not toll the time to appeal; however, motions to alter or amend are not "successive" when they were timely filed after the court substantially altered the judgment, giving the parties a statutory right to seek alteration or amendment of the "new judgment" in the trial court before appealing to an appellate court.
8. **Divorce: Property Division: Appeal and Error.** An appellate court reviews a dissolution case de novo on the record to determine whether there has been an abuse of discretion by the trial judge. Such standard also applies to the trial court's determinations regarding the division of property.
9. **Evidence: Appeal and Error.** In a de novo review, an appellate court reappraises the evidence in the record and reaches its own independent conclusions.
10. ____: ____. Where the evidence is in conflict on a material issue of fact, the appellate court considers and may give weight to the fact that the trial judge heard and observed the witnesses and accepted one version of the facts rather than another.
11. **Judges: Words and Phrases.** A judicial abuse of discretion exists when the reasons or rulings of a trial judge are clearly untenable, unfairly depriving a litigant of a substantial right and denying just results in matters submitted for disposition.
12. **Appeal and Error.** An issue not properly presented to and passed upon by the trial court may not be raised on appeal.
13. **Divorce: Property Division.** In dissolution matters, property divisions are not subject to a rigid mathematical formula and the division must, most of all, be reasonable.

Appeal from the District Court for Greeley County: RONALD D. OLBERDING and MARK D. KOZISEK, Judges. Affirmed.

Gregory G. Jensen, P.C., L.L.O., for appellant.

Barry D. Geweke, of Stowell, Kruml, Geweke & Cullers, P.C., L.L.O., for appellee.

IRWIN, SIEVERS, and MOORE, Judges.

SIEVERS, Judge.

Rhonda L. Gebhardt and John O. Gebhardt were divorced by a decree of dissolution of marriage entered on May 1, 2006, by then District Judge Ronald D. Olberding in the district court for Greeley County, Nebraska. Judge Olberding retired effective April 30. Following the entry of decree, there was a motion for a new trial on May 3 and a ruling thereupon on August 10 by District Judge Mark D. Kozisek. Thereafter, there were a series of motions to alter or amend judgment, rulings thereupon, and finally Rhonda's notice of appeal, which was filed January 23, 2007. These procedural occurrences, which we discuss in further detail below, raise jurisdictional issues which we have previously directed the parties to address in their briefs. We have determined that the matter should be submitted for decision without oral argument pursuant to our authority under Neb. Ct. R. of Prac. 11B(1) (rev. 2006).

PROCEDURAL BACKGROUND

The district court's decree of dissolution of May 1, 2006, was followed by Rhonda's motion for a new trial of May 3. The motion raised issues with respect to the trial court's property division, award of alimony, and failure to award her attorney fees. Judge Kozisek's order on Rhonda's motion for new trial and order modifying decree was entered August 10. Citing *Heald v. Heald*, 259 Neb. 604, 611 N.W.2d 598 (2000), Judge Kozisek recited in his order the well-known three-step process for property division: (1) to classify the parties' property as marital or nonmarital, (2) to value the marital assets and liabilities, and (3) to calculate and divide the net marital estate.

The trial court found a number of problems with the previous property division, which we will not fully detail other than to set forth the order portion of the ruling, which provided that the motion to set aside the judgment and grant a new trial was overruled, but that the judgment of May 1, 2006, was modified to provide:

> "[Rhonda] is awarded all property and ordered to pay all debt listed under the column heading 'Rhonda' on the Property Division Worksheet. [John] is awarded all property

> and ordered to pay all debt listed under the column heading 'John' on the Property Division Worksheet.
>
> "[John] shall pay to the court clerk for disbursement to [Rhonda] as property settlement the total sum of $62,000.00 within 60 days of entry of this order. There shall be no interest if paid on or before the due date, but any delinquent payment shall bear interest at the judgment rate of 7.297% per annum from due date until paid."

Otherwise, the trial court left the original decree of dissolution unchanged. This ruling of August 10 changed the May 1 judgment by awarding Rhonda a $62,000 judgment against John which had not previously been part of the decree.

Within 10 days of the August 10, 2006, decision, John filed a motion to alter or amend the order modifying decree so as to eliminate the $62,000 judgment against him and in favor of Rhonda. Additionally, John's motion asserted that the original decree of dissolution of May 1 failed to give him credit for a $384,288.67 cash inheritance and that with said credit, no property settlement judgment against him was warranted.

Rhonda filed a "Cross Motion to Alter or Amend Order Modifying Decree" on October 10, 2006.

By an "Order on Motion to Alter or Amend Order Modifying Decree" entered on November 14, 2006, Judge Kozisek first found that Rhonda's pending cross-motion to alter or amend filed October 10 was filed more than 10 days after the entry of the order modifying decree of August 10, and therefore the court granted John's motion to strike Rhonda's cross-motion to alter or amend as untimely. The trial court then took up John's motion to alter or amend, and after citing authority making inheritances and gifts which are traceable nonmarital property, see *Quinn v. Quinn*, 13 Neb. App. 155, 689 N.W.2d 605 (2004), the court found that "it incorrectly failed to give John credit for the inheritance and life insurance when it rendered its Order Modifying Decree." The trial court had allowed a credit to Rhonda for her inherited property in the amount of $43,000. However, Judge Kozisek found that there was no evidence adduced which traced such inherited property and that no credit would be allowed for Rhonda's inherited property. Thus, the court ordered that John's motion to alter or amend was granted

to the extent of allowing him credit for inherited property and life insurance proceeds in the amount of $384,288.67. The court further ordered:

> The judgment previously entered on May 1, 2006 . . . and the Order Modifying Decree entered August 10, 2006 are modified to provide:
>
> "[Rhonda] is awarded all property and ordered to pay all debt listed under the column heading 'Rhonda' on the Property Division Worksheet-2. [John] is awarded all property and ordered to pay all debt listed under the column heading 'John' on the Property Division Worksheet-2. Neither party shall pay the other money for any property division."

Rhonda was unsatisfied with the above outcome and therefore filed another motion to alter or amend the order modifying decree on November 22, 2006, which was within 10 days of November 14. Such motion was denied by a signed and filed journal entry of December 28, after which Rhonda filed an appeal to this court on January 23, 2007.

JURISDICTIONAL ANALYSIS

[1,2] Before reaching the legal issues presented for review, it is the duty of an appellate court to determine whether it has jurisdiction over the matter before it. *Saunders County v. City of Lincoln*, 263 Neb. 170, 638 N.W.2d 824 (2002). Notwithstanding whether the parties raise the issue of jurisdiction, an appellate court has a duty to raise and determine the issue of jurisdiction sua sponte. *Keef v. State*, 262 Neb. 622, 634 N.W.2d 751 (2001).

This appeal raises issues dealing with the tolling effect of a motion to alter or amend, the effect of successive motions to alter or amend, and ultimately, if we have jurisdiction, which actions of the trial court are subject to our appellate review.

Rhonda asserts that because she was satisfied with the order on her motion for new trial of August 10, 2006, she takes "the unusual position of arguing that this Court lacks jurisdiction," provided we determine that the August 10 order is the final order in this case, from which order an appeal needed to be filed within 30 days. Brief for appellant at 1. As we understand

Rhonda's jurisdictional argument, it is that only her motion for new trial of May 3 was effective to terminate the running of the 30 days in which to appeal to this court. We note that Rhonda does not assign error to the trial court's ruling of November 14, or its ruling of December 28. However, perhaps we are to infer from Rhonda's argument that she would have us declare the trial court's rulings of November 14 and December 28 nullities. John concludes his briefing by asking us to affirm either the decree of dissolution of May 1 or the order modifying decree of November 14.

[3-5] Both parties reference *Mason v. Cannon*, 246 Neb. 14, 516 N.W.2d 250 (1994), for two fundamental propositions: (1) An untimely motion for new trial is ineffectual and does not toll the time for perfection of an appeal, nor does it extend or suspend the time limit for filing such appeal, and (2) the filing of a motion for new trial and its subsequent overruling do not convert an otherwise unappealable order into an appealable order. However, *Mason* was decided before the operative date (April 16, 2004) of the statute providing for the filing of a motion to alter or amend, Neb. Rev. Stat. § 25-1329 (Cum. Supp. 2006). Section 25-1329 requires the filing of such a motion no later than "ten days after the entry of the judgment." And, under Neb. Rev. Stat. § 25-1912(3) (Cum. Supp. 2006), such a motion timely filed terminates the running of the time for filing a notice of appeal "as to all parties." In order to be a tolling motion, a motion to alter or amend must seek substantive alteration of the judgment. See *Weeder v. Central Comm. College*, 269 Neb. 114, 691 N.W.2d 508 (2005).

Returning to *Mason v. Cannon, supra*, the trial court entered an order on June 3, 1992, dismissing the case for want of prosecution. The plaintiff, Sandra Mason, did not appeal, but, rather, filed a motion to vacate the order of dismissal and set the matter for trial. The Nebraska Supreme Court, citing *Abboud v. Cutler*, 238 Neb. 177, 469 N.W.2d 763 (1991), held that a motion to vacate filed within 10 days of an order of dismissal is the equivalent of the filing of a motion for new trial. Mason's motion to vacate was overruled on June 22. The *Mason* court said that the overruling of the motion to vacate was a final order requiring the filing of a notice of appeal

within 30 days of June 22, but that because Mason filed another motion for new trial, dated June 26, 1992, and because successive motions for new trial cannot extend the appeal time, Mason's notice of appeal filed on September 21, after the trial court overruled her second motion for new trial on August 21, was an ineffective notice of appeal and thus the Supreme Court lacked jurisdiction.

Mason is instructive but not determinative of the result in this case, because it did not involve a motion to alter or amend and, most important, the trial court in *Mason* took no action which altered or changed the judgment between the two motions for new trial filed by Mason. Our situation is substantially different. Perhaps that difference is underscored by recalling exactly what constitutes a judgment, remembering that the motion to alter or amend judgment tolls the appeal time when the motion seeks a substantial alteration of a judgment.

[6] The statutory definition of "judgment" is found in Neb. Rev. Stat. § 25-1301(1) (Cum. Supp. 2006): "A judgment is the final determination of the rights of the parties in an action." To be final, an order must dispose of the whole merits of the case and leave nothing for further consideration of the court, and thus the order is final when no further action of the court is required to dispose of the pending cause. However, if the cause is retained for further action, the order is interlocutory. See *Hake v. Hake*, 8 Neb. App. 376, 594 N.W.2d 648 (1999), citing *Moulton v. Board of Zoning Appeals*, 251 Neb. 95, 555 N.W.2d 39 (1996).

Therefore, when reviewing the procedural events of this case sequentially, we begin with the entry of the decree of dissolution of May 1, 2006, by Judge Olberding. That order retained nothing for further action and was clearly a final order within the foregoing definitional parameters. Rhonda's motion for new trial of May 3 is unquestionably a motion which tolls the time in which to appeal the district court's decree. On August 10, the district court ruled on Rhonda's motion for new trial and substantially altered the judgment by adding a $62,000 judgment to the decree in her favor and against John. This decision is unquestionably a judgment, and under the plain language of § 25-1329, a party may seek to alter or amend this judgment,

a tactic that John would understandably consider doing before filing an appeal. If such a motion is filed within 10 days of August 10, the time to appeal to this court is tolled until 30 days after the motion to alter or amend is disposed of. John's motion to alter or amend sought to eliminate the $62,000 judgment that had been imposed upon him 8 days earlier in the order of August 10, and he sought to gain credit for his $384,288.67 cash inheritance as a basis to eliminate the obligation to pay Rhonda $62,000, which would be a substantial alteration.

As a result of this "new judgment," John's motion to alter or amend was a tolling motion and had to be disposed of before the 30 days in which to appeal to this court began to run. We digress to note that on October 10, 2006, Rhonda filed a cross-motion to alter or amend the August 10 judgment. This motion to alter or amend was obviously out of time and a nullity, as the trial court found. The trial court then ruled on John's motion to alter or amend in its order of November 14, by removing Rhonda's $43,000 credit for inherited property, which credit was in the original May 1 decree, and by eliminating the $62,000 judgment given to Rhonda by the order modifying decree entered August 10. Thus, the trial court entered a new judgment which again substantially altered the decree, to Rhonda's disadvantage.

On November 22, 2006, within 10 days of the November 14 judgment, Rhonda moved again to alter or amend the judgment, seeking to restore to her the $62,000 property settlement judgment against John. This motion by Rhonda clearly sought substantial alteration of what by now was the third judgment in this case, and thus Rhonda's motion was a tolling motion. Accordingly, when Rhonda's last motion to alter or amend was denied on December 28 with no change in the third judgment, the third judgment became a final, appealable order. As a result, Rhonda's notice of appeal filed on January 23, 2007, was within 30 days of December 28, 2006, and was therefore effective. Therefore, we have jurisdiction of this appeal to conduct appellate review of the final judgment entered in this divorce case, which judgment did not occur until the third attempt at a final order entered on November 14. That order became final with the overruling of Rhonda's motion to alter or amend such

judgment on December 28, at which time the 30-day clock in which to appeal began to run.

[7] If Rhonda, instead of filing a notice of appeal within 30 days of December 28, 2006, would have filed another motion to alter or amend attacking the trial court's decision of November 14, the principles of *Mason v. Cannon*, 246 Neb. 14, 516 N.W.2d 250 (1994), would apply. Because, at that point, she would have filed successive motions to alter or amend the same judgment. However, in this case, her various motions to alter or amend were not "successive" in the sense condemned in *Mason*. In other words, while successive motions to alter or amend would not toll the time to appeal under the reasoning of *Mason*, the motions to alter or amend in this case were not "successive," because they were timely filed after the court substantially altered the judgment, giving the parties a statutory right to seek alteration or amendment of the "new judgment" in the trial court before appealing to this court. Therefore, we have jurisdiction over Rhonda's appeal and now proceed to take up her assignments of error.

ASSIGNMENTS OF ERROR

While Rhonda assigns four errors, the foregoing discussion of the jurisdictional issue disposes of Rhonda's fourth assignment of error relating to the district court's ruling that Rhonda's October 10, 2006, cross-motion to alter or amend the August 10 judgment was out of time. We have affirmed the finding that such motion is a nullity. Accordingly, the remaining assignments of error for decision are that (1) the district court erred in using July 22, 2005, as the valuation date for the parties' property; (2) the district court erred in assigning values to marital assets and marital debt; and (3) the district court erred in failing to consider improvements made to inherited property.

STANDARD OF REVIEW

[8] An appellate court reviews a dissolution case de novo on the record to determine whether there has been an abuse of discretion by the trial judge. Such standard also applies to the trial court's determinations regarding the division of property. See *Longo v. Longo*, 266 Neb. 171, 663 N.W.2d 604 (2003).

[9,10] In its de novo review, an appellate court reappraises the evidence in the record and reaches its own independent conclusions. See *McGuire v. McGuire*, 11 Neb. App. 433, 652 N.W.2d 293 (2002). However, where the evidence is in conflict on a material issue of fact, the appellate court considers and may give weight to the fact that the trial judge heard and observed the witnesses and accepted one version of the facts rather than another. See *id.*

[11] A judicial abuse of discretion exists when the reasons or rulings of a trial judge are clearly untenable, unfairly depriving a litigant of a substantial right and denying just results in matters submitted for disposition. *Tyma v. Tyma*, 263 Neb. 873, 644 N.W.2d 139 (2002).

ANALYSIS

As a predicate to the discussion of Rhonda's first two assignments of error, we note that the parties were married in September 1988, four children were born to the marriage, and Rhonda filed for dissolution on July 22, 2005. Both parties are in their forties, John is a farmer-rancher, and since 2000, Rhonda has been a full-time public school teacher.

Valuation Date.

In the early 1990's, the Gebhardts moved to Greeley County to farm. The president of the State Bank of Scotia testified with respect to the Gebhardt family finances. Apparently, in order to secure operating loans, the Gebhardts submitted financial statements around the first of March each year. The bank's president testified from the bank's documentation that a February 12, 2003, financial statement revealed that the Gebhardts had a net worth of $26,580. Their assets were valued at $534,977, against which there was debt of $508,397. Following the death of John's mother, the financial picture materially changed. A financial statement dated August 31, 2004, in the bank's records revealed that at that time, the Gebhardts' net worth was $1,201,000, with total assets of $1,322,000 and total debt of $121,000. The trial court found that this substantial increase in net worth was due to John's inheritance, not from the efforts of the parties, and no claim is made that such finding is erroneous.

Rhonda argues that the trial court improperly used July 22, 2005, the date Rhonda filed for dissolution, as the date to value assets and debts, because such date bore no rational relationship to the assets to be divided, particularly with regard to the crops and the livestock. Given Rhonda's testimony on cross-examination as quoted below, this assignment of error is without merit. The record reveals the following cross-examination of Rhonda:

> Q. You do not object to using July 22, 2005 as the date to value assets?
>
> A. I believe, if John is honest, I believe those are okay, yes.
>
> Q. You are okay with using July 22, 2005.
>
> [Objection as calling for a legal conclusion was overruled.]
>
> A. Say it one more time.
>
> Q. Do you agree with using July 22, 2005 as the date to . . . value assets and debt?
>
> A. When I filed?
>
> Q. Yes.
>
> A. Yes.

[12] This testimony brings into play the well-established rule that an issue not properly presented to and passed upon by the trial court may not be raised on appeal. See *Beaver Lake Assn. v. Sorensen*, 231 Neb. 75, 434 N.W.2d 703 (1989). Additionally, we note that in none of the postdecree motions filed by Rhonda did she raise the issue to the trial court that the July 22, 2005, valuation date was improper. This assignment of error is without merit.

Value of 2005 Corn Crop.

The trial court valued the irrigated corn crop for 2005 at $102,235 and the dryland corn crop at $4,000. With respect to both values, the court found: "While [Rhonda] asks the court to speculate that the value was more, she presented no credible evidence to justify the increase." John's evidence valued the corn crop at $102,235, using a formula of 508 acres at 175 bushels per acre estimated at $2.30 per bushel (including "LDP" money) reduced by "50% of season." Rhonda argues

that instead of using the 50-percent valuation factor that is tied to the time of year that valuation occurred (and also tied to the midpoint in the growing season, we assume), the crop should have been valued at $204,470. We have closely examined Rhonda's testimony on this point. She testified that there was a "variance" with respect to the value of the dryland and irrigated corn because John "only valued half the value rather than the entire value of the corn crop." That said, Rhonda was willing to use John's values of $2.30 per bushel and yield of 175 bushels per acre—just not the percentage reduction that John incorporated into his valuation that was adopted by the court. The foregoing is the extent of Rhonda's direct evidence with respect to the corn crop.

In John's testimony, he conceded that the seed had been planted and that all chemicals, fertilizer, and herbicide had been applied prior to July 22, 2005. However, when asked on cross-examination whether his only expenses after July 22 would have been for "running the irrigation motors and hauling the crop to town," he disagreed, pointing out there was second-half cash rent on one farm, crop insurance premiums around $8,000, and an estimate of $10,000 for fuel, which we assume meant fuel for harvest. He also testified that the "Aurora Co-op" was paid in August for chemicals by a check for $48,000.

[13] In summary, Rhonda would have us include in the marital estate the gross value of the 2005 corn crop and ignore all of the costs associated with planting it, fertilizing it, watering it, and harvesting it. In *Blaser v. Blaser*, 225 Neb. 104, 107, 402 N.W.2d 875, 877 (1987), the court emphasized that in dissolution matters, property divisions are not subject to a rigid mathematical formula and the "division must, most of all, be reasonable." Rhonda's position about valuation of the 2005 corn crop simply is not reasonable. This assignment of error is without merit. The evidence is undisputed that after July 22, 2005, Rhonda provided no help with irrigating, working with the cattle, or operating the farm equipment. Accordingly, after the trial court's valuation date, John was solely responsible for turning the 2005 growing crop into cash. And, the trial court did not err in rejecting Rhonda's claim that the 2005 corn crop be valued without regard to the cost of raising it.

Improvements to Inherited Property.

Rhonda asserts that the trial court "erred in failing to consider improvements made to inherited property as a marital asset." Rhonda did not testify on this subject. John testified in response to a cross-examination question about improvements to the inherited real estate that in the fall of 2004, all trees were cleared off "the building site" at a cost of around $10,000, a new pivot was built in the spring of 2005 (although on what farm is not specified), and a storage bin was acquired. As we understand John's testimony, approximately $67,000 was spent for this work, which he said he paid for in 2005. The record does not specify whether the payment was before or after July 22, but it was financed via a note at the State Bank of Scotia.

The foregoing evidence is obviously sketchy at best. Nonetheless, the inescapable conclusion from the entire record is that if the note was paid before the divorce was filed, it was likely paid from John's inheritance, given that the parties did not appear to have substantial assets or cash until John's inheritance. Moreover, there is no evidence in the record to establish that the improvements John made to his inherited, and therefore separate, property increased such property's value over and above the cost of the improvements. Accordingly, on the sketchy record we have on this issue, we cannot say that the trial court abused its discretion in any way concerning this aspect of the property division.

CONCLUSION

Because successive and material changes were made to the decree of dissolution, the motions to alter or amend that were filed within 10 days of the "change orders" tolled the time to appeal to this court. Accordingly, we have jurisdiction over Rhonda's appeal. However, none of her assignments of error have merit.

AFFIRMED.

MELVIN VANDERHEIDEN ET AL., APPELLANTS, V. CEDAR COUNTY BOARD OF EQUALIZATION, APPELLEE.

746 N.W.2d 717

Filed March 18, 2008. Nos. A-07-373 through A-07-376, A-07-383 through A-07-392.

1. **Appeal and Error.** Errors assigned but not argued will not be addressed on appeal.
2. **Taxation: Judgments: Appeal and Error.** Decisions rendered by the Tax Equalization and Review Commission shall be reviewed by the court for errors appearing on the record of the commission.
3. **Judgments: Appeal and Error.** When reviewing a judgment for errors appearing on the record, an appellate court's inquiry is whether the decision conforms to the law, is supported by competent evidence, and is neither arbitrary, capricious, nor unreasonable.
4. **Taxation: Appeal and Error.** Questions of law arising during appellate review of Tax Equalization and Review Commission decisions are reviewed de novo on the record.
5. **Taxation: Presumptions: Evidence.** The statutes governing the Tax Equalization and Review Commission create a presumption that a board of equalization has faithfully performed its official duties and has acted upon sufficient competent evidence to justify its actions. This presumption remains until there is competent evidence to the contrary presented. Once the presumption has been rebutted, the burden shifts to the party requesting the exemption to prove its entitlement thereto.

Appeals from the Tax Equalization and Review Commission. Affirmed.

Boyd W. Strope, of Strope & Gotschall, P.C., for appellants.

Dennis D. King, of Smith & King, P.C., for appellee.

SIEVERS, CARLSON, and MOORE, Judges.

MOORE, Judge.

INTRODUCTION

Fourteen owners of real property situated in Cedar County filed property valuation protests with the Cedar County Board of Equalization (County Board) challenging the 2005 assessed valuation of their property. Upon denial of the protests, the taxpayers appealed to the Nebraska Tax Equalization Review Commission (TERC), which consolidated their appeals for purposes of a hearing. Following presentation of evidence by

the taxpayers and the county, the TERC determined that the taxpayers had not overcome the presumption that the challenged valuations were correct and therefore affirmed the decisions of the County Board. The taxpayers perfected this timely appeal. Because the TERC's decision conforms to the law, is supported by competent evidence, and is neither arbitrary, capricious, nor unreasonable, we affirm.

BACKGROUND

The present appeals involve the valuation of agricultural land in Cedar County, Nebraska, for the tax year 2005 with an assessment date of January 1, 2005. For the tax year 2005, the county assessor divided the county into two market areas for the assessment of agricultural and horticultural land, described as "Market Area 1" and "Market Area 2." All but one of the 48 pieces of real property involved in these appeals are located in Market Area 2. Market Area 2 is located in the southeast portion of the county, consists of six townships, is rectangular in shape, and is 18 miles long by 13 miles wide. Township lines were used as the boundaries for Market Area 2 on the north and west sides. The east and south boundary lines of Market Area 2 are the county's boundaries with adjacent counties. Market Area 1 encompasses the balance of the county beyond the boundaries of Market Area 2. The assessment in question resulted in different valuations' being placed on land of the same soil type depending on the market area in which the land was located.

A hearing was held before the TERC in this case on November 15, 2006. The following issues for the hearing were agreed upon by the parties: (1) whether the market area analysis is a professionally accepted mass appraisal method, (2) whether the market areas as drawn by the county assessor comply with professionally accepted methodology for establishing value, (3) whether the use of market areas to determine the value of agricultural and horticultural land is prohibited by Nebraska's Constitution or by law, (4) whether the taxpayers' property had been assessed uniformly and proportionately by valuing such property at the same percentage of actual value as other similarly situated property in the county, and (5) whether the taxpayers' property had been valued uniformly when the same

or similar soil types within the same county have different values assigned thereto. At the hearing before the TERC, the taxpayers' position was that the County Board did not uniformly or proportionately order the correct taxable value for the taxpayers' agricultural property for the tax year 2005. The taxpayers presented an equalization argument only. The taxpayers alleged before the TERC that the market areas should not have been used and further alleged that the market areas in question were not properly created through professionally accepted methodology.

The taxpayers offered certain exhibits into evidence and the testimony of the Cedar County assessor, Don Hoesing. The County Board also provided certain exhibits, which were received into evidence, and the testimony of Hoesing; Catherine Lang, Nebraska's Property Tax Administrator; Jerry Knoche, an appraiser; and Barb Oswald, a liaison for Lang.

The taxpayers elicited testimony from Hoesing that there was irrigated ground in Market Area 1 being valued for less than dryland ground in Market Area 2. Hoesing affirmed that irrigated ground is generally valued higher than dryland ground.

The taxpayers did not produce any evidence of the actual value or characteristics of the subject properties other than the information listed on valuation documents offered by the County Board.

Lang reviewed the various sales statistics and gave her opinion that the levels of value in each market area were within the acceptable range. Lang noted that the average assessed sale price and average assessed value for the two market areas were significantly different from each other, indicating that the average selling price per sale was different between the two market areas and that the average assessed value was different. Lang testified that the only statistic that was outside the acceptable range was the price-related differential for Market Area 2, but she testified that the price-related differential is not as directly applicable in the agricultural statistics as it would be for residential real property. Lang testified further concerning the price-related differential figure in this case, stating that statistically it would be deemed to be high and that what that indicates in improved properties is that the market value for

lower-priced properties is assessed at a higher level than that for higher-priced properties. Lang testified that in agricultural land, that is not as direct a comparison because the higher price paid may be for more acres of land.

Hoesing was recalled to testify by the County Board. Hoesing had been the county assessor for approximately 10 years, during which time he had noticed that land was selling for more in certain parts of the county. Hoesing testified that using a combination of several factors, only one of which was the sales ratio of sales in the county, he developed boundaries for market areas. In 2003, three market areas were established. In 2005, the north-south line separating the second and third market areas was removed and the new market area was designated Market Area 2.

Hoesing used several factors to establish the boundary lines for Market Area 2, including an examination of the land for soil types, productivity, availability of water, relation to market distribution points, land use, geography, and sales history. Based on this analysis, the boundary lines were established using township lines on the north and west sides of Market Area 2 and the county's boundary lines on the east and south sides. Hoesing described differences in topography throughout the county. Hoesing stated that in the northeast part of the county along the Missouri River, a certain amount of recreational property exists which is used for, among other things, water-related activities. In that part of the county, there are more trees and brush, with grass area continuing to the south. In the northwest part of the county, there is less tree cover with more farming and pasture ground. Farms in the northern portion of the county raise "small grain hay crops," corn, and soybeans and have a fair amount of center-pivot irrigation. Hoesing also described the topography moving into the south part of the county, where the topography becomes more gently rolling with larger farms and fields, minimal grass, and less livestock production.

Hoesing testified that prior to his use of market areas, he had problems with some valuation results' not being within the acceptable range for the statistical analysis required by Nebraska statutes. Hoesing created certain documentary exhibits to demonstrate that substituting the values from one market

area in the other market area resulted in unacceptable statistical results. The evidence demonstrated that the use of market areas in valuing agricultural and horticultural land in the county gave a more accurate picture of the market for agricultural land in the county than would have resulted from not using market areas. Hoesing testified that he began to use market areas because when he analyzed sales throughout the county, in the southern part of the county the level of assessment was historically and consistently lower than the level of assessment through the rest of the county.

Knoche testified that he had become familiar with the market characteristics of the two market areas. Knoche testified that in the northern portion of the county, "you get into what I call patch farming, because you don't have full quarters." Knoche testified that while some of the same soil types exist in both market areas, their distribution in the northern part of the county is "not in the generous portions that it is in the southern part of the county." Knoche described the occurrence of larger, consolidated farms with big fields in the southern portion of the county. Knoche was asked about a cluster of a particular soil type included in Market Area 1 and whether it would have been appropriate to include that cluster in Market Area 2. Knoche's recollection was that either there were no sales occurring in that area or there were several sales occurring in that area that matched more closely with the values in the northern portion of the county. Knoche opined that the agricultural land in Cedar County was assessed uniformly and proportionately within each market area.

Oswald testified in her role as liaison between the "Department of Property Tax Administration" and Cedar County. As liaison, her duties include consulting with the county assessor's office and analyzing the measurements of taxable value for agricultural and horticultural lands. Oswald had been the liaison for the past 9 years and had worked for the past 27 years in the business of assessing real property. Oswald holds both an assessor's certificate and a registered appraiser's license. As liaison, Oswald has 10 counties under her responsibility, all located in the northeast portion of Nebraska. Prior to testifying, Oswald reviewed the statistics for Cedar County and prepared various

exhibits validating the use of market areas in Cedar County and the uniformity and proportionality of the assessed taxable value of agricultural and horticultural land in Cedar County. Oswald testified that the property in Cedar County has been assessed uniformly and proportionately by valuing the property at the same percentage of actual value as other similarly situated property in the county.

The TERC issued a decision and order dated March 14, 2007, affirming the decisions of the County Board. In its written decision, the TERC provided some background information on market areas. The TERC then set forth the process an appraiser goes through to identify a market area's boundaries. The TERC stated that an appraiser's investigation begins with an examination of the subject property and its surroundings, proceeding outward, identifying all relevant and potential locational influences on the property's value. The appraiser extends the search outward to encompass all of the market influences affecting the property's value, and when no more factors are found, the boundaries for analysis are set. The TERC stated that county assessors in Nebraska have been guided by Neb. Rev. Stat. § 77-103.01 (Reissue 2003) as to which characteristics are to be considered in the creation and use of market areas; those characteristics include parcel use, parcel type, location, geographic characteristics, zoning, city size, parcel size, and market characteristics appropriate for the valuation of such land.

The TERC noted that the location of a particular soil type within the boundaries of a county has a bearing on the valuation for soil type. The TERC stated that location can be a positive or negative factor and that a location can be hampered by woodlands, rivers, or manmade structures or can be enhanced by its proximity to nearby elevators, more plentiful rainfall, or many items that only a buyer can define. The TERC further noted that the market defines the value placed on property and that a certain market will pay more for property within certain locations. The TERC stated that the duty of an assessor is to be able to read that market and then assess the property in a uniform and proportionate manner.

The TERC reviewed the statistical exhibits prepared by Oswald and found the statistics were all within acceptable

levels. The TERC noted that the exhibits prepared by Oswald showed that the statistics do not fall within the acceptable range when the values for agricultural and horticultural land in either market area are substituted for the values in the other area. The TERC concluded that the respective market area values work to create acceptable valuations which are uniform and proportionate for each market area and the county overall.

The TERC found from its review of the evidence that the taxpayers had not met their burden to show that the County Board was incorrect in its decision. The TERC further found that the taxpayers had not shown by clear and convincing evidence that the decision of the County Board was arbitrary or unreasonable. The TERC found that the taxpayers had failed to provide proof that their property was not valued uniformly and proportionately with respect to other property of similar type within the same market area and had failed to provide any evidence of actual value of the subject properties or any other evidence concerning the characteristics of the subject properties or the comparable properties, other than soil type.

The TERC found that the County Board had shown by reasonable evidence that the taxable valuation of agricultural and horticultural lands for 2005 in Cedar County was uniform and proportionate within each market area. The TERC found that market area analysis was a professionally accepted mass appraisal method, but it cautioned that the creation of market areas must be accomplished using professionally accepted methodology. The TERC found that Cedar County did establish market areas using professionally accepted methodology and noted that Lang, Knoche, and Oswald, witnesses called by the County Board, testified that the use of market areas was a professionally accepted methodology for mass appraisal of agricultural and horticultural property. The TERC noted that witnesses Hoesing, Knoche, and Oswald testified that market areas were drawn in Cedar County with professionally accepted methodology. The TERC concluded that the market areas, as drawn by the county assessor, do comply with professionally accepted methodology for establishing value.

The TERC found that the taxpayers' properties had been assessed uniformly and proportionately at the same percentage

of actual value as other similarly situated property in the county. The TERC found that the taxpayers' properties had been valued uniformly despite the fact that the same or similar soil types in the same county have different values assigned to them. The TERC found that the taxpayers had failed to meet their burden of showing that the County Board was incorrect or acted in an arbitrary or unreasonable manner. The TERC accordingly affirmed the decisions of the County Board determining taxable value of the subject properties as of the assessment date of January 1, 2005.

ASSIGNMENTS OF ERROR

[1] The taxpayers assert, consolidated and restated, that the TERC erred in finding that the market areas as drawn by the county assessor complied with professionally accepted methodology. The taxpayers also assert, but do not argue, that the TERC erred in concluding that evidence used to establish the market area boundary lines in 2003 was inadmissible because it was not relevant. Errors assigned but not argued will not be addressed on appeal. *Peterson v. Ohio Casualty Group*, 272 Neb. 700, 724 N.W.2d 765 (2006).

STANDARD OF REVIEW

[2-4] Decisions rendered by the TERC shall be reviewed by the court for errors appearing on the record of the TERC. *City of York v. York Cty. Bd. of Equal.*, 266 Neb. 297, 664 N.W.2d 445 (2003). When reviewing a judgment for errors appearing on the record, an appellate court's inquiry is whether the decision conforms to the law, is supported by competent evidence, and is neither arbitrary, capricious, nor unreasonable. *Id.* Questions of law arising during appellate review of TERC decisions are reviewed de novo on the record. *Id.*

ANALYSIS

The taxpayers assert that the TERC erred in finding that the market areas as drawn by the county assessor complied with professionally accepted methodology.

The Nebraska Supreme Court addressed the use of market areas in *Bartlett v. Dawes Cty. Bd. of Equal.*, 259 Neb. 954, 613 N.W.2d 810 (2000), a case originating procedurally from

an action by the TERC to adjust assessments within a county in order to achieve equalization within the state under Neb. Rev. Stat. § 77-5026 (Cum. Supp. 1998). The *Bartlett* court reviewed the statutory scheme for valuation of agricultural land:

> Agricultural land constitutes a separate and distinct class of property for purposes of property taxation. Neb. Rev. Stat. § 77-1361(1) (Cum. Supp. 1998). Neb. Const. art. VIII requires uniform and proportionate assessment within the class of agricultural land. Agricultural land is then divided into "categories" such as irrigated cropland, dry cropland, and grassland. Neb. Rev. Stat. § 77-1363 (Cum. Supp. 1998). These categories are further divided into subclasses based on soil classification.

259 Neb. at 962, 613 N.W.2d at 817.

In *Bartlett*, the Dawes County assessor had divided the county into four agricultural "market areas" for property tax purposes. The boundaries for each market area were based upon where assessment-to-sales ratios for various land sales fell on the county map, were drawn along township or half-township lines, and were not consistent with the soil classifications depicted on the soil map of Dawes County, a fact admitted by the assessor. The Dawes County Board of Equalization argued that the TERC correctly found that the establishment of market areas is a professionally recognized method of mass appraisal under Neb. Rev. Stat. § 77-112 (Cum. Supp. 1998). The *Bartlett* court assumed without deciding that market area analysis is a professionally accepted mass appraisal method for establishing actual value, but it rejected the use of the market areas employed in that case as violative of the statutory scheme set out by the Legislature, stating:

> The evidence in this case indicates that the market areas established by the assessor were not, in fact, based on soil classification, but, instead, were based on assessment-to-sales ratios. Subclasses of agricultural land must be based on soil classification, not upon where the land is located. The market areas do not constitute subclasses of agricultural land as defined by our statutes.

259 Neb. at 963, 613 N.W.2d at 817. See, also, *Schmidt v. Thayer Cty. Bd. of Equal.*, 10 Neb. App. 10, 624 N.W.2d 63 (2001)

(relying on *Bartlett* in rejecting TERC's approval of valuation of property in market area not based on soil classification).

After the Supreme Court's decision in *Bartlett*, the Legislature enacted § 77-103.01, which currently states:

> Class or subclass of real property means a group of properties that share one or more characteristics typically common to all the properties in the class or subclass, but are not typically found in the properties outside the class or subclass. Class or subclass includes, but is not limited to, the classifications of agricultural land or horticultural land listed in section 77-1363, parcel use, parcel type, location, geographic characteristics, zoning, city size, parcel size, and market characteristics appropriate for the valuation of such land. A class or subclass based on market characteristics shall be based on characteristics that affect the actual value in a different manner than [they affect] the actual value of properties not within the market characteristic class or subclass.

The Committee Statement for the bill that would ultimately be enacted as, among other things, § 77-103.01 provides:

> Section 3 would provide a definition of "class or subclass of real property" to be applicable throughout the property tax statutes. According to the definition, a class or subclass is a group of properties that share characteristics not shared by those outside the class or subclass. The classification may be based on use, size, zoning, city size, or market characteristics. If based on the market, the class must be based on characteristics that affect market value. This change is a response to the Nebraska Supreme Court decision in *Bartlett v*[.] *Dawes County Bd. of Equalization*, 259 Neb[.] 954, [6]13 N.W.2d 810 (2000), which held that the TERC may not adjust by market area to achieve intercounty equalization because market areas are not classes or subclasses of property found in the statutes . . . .

L.B. 170, Revenue Committee, 97th Leg., 1st Sess. (Jan. 25, 2001). A review of the floor debate for the bill makes it clear that this statutory section was enacted in response to the decision in *Bartlett v. Dawes Cty. Bd. of Equal.*, 259 Neb. 954, 613 N.W.2d 810 (2000).

For purposes of our review of the present case, the critical portion of § 77-103.01 is the requirement that "[a] class or subclass based on market characteristics shall be based on characteristics that affect the actual value in a different manner than [they affect] the actual value of properties not within the market characteristic class or subclass." The evidence adduced in this case shows that the market areas in question were drawn in compliance with this requirement. The evidence shows that the market areas in this case were established based upon an examination of the land for soil types, productivity, availability of water, relation to market distribution points, land use, geography, and sales history. Although the market area boundaries are drawn on township and county lines and do not follow soil classifications, the record shows that the topography varies throughout the county, that there are smaller farms in the north than in the south part of the county, and that the larger properties tend to sell for a higher value. The record shows that the use of market areas in valuing agricultural land in the county gave a more accurate picture of the market than would have resulted from not using market areas.

[5] The statutes governing the TERC create a presumption that the County Board has faithfully performed its official duties and has acted upon sufficient competent evidence to justify its actions. *City of York v. York Cty. Bd. of Equal.*, 266 Neb. 297, 664 N.W.2d 445 (2003). This presumption remains until there is competent evidence to the contrary presented. *Id.* Once the presumption has been rebutted, the burden shifts to the party requesting the exemption to prove its entitlement thereto. *Id.* The TERC found that the taxpayers had not presented evidence to overcome this presumption. We have reviewed the TERC's decision for errors on the record and find that the TERC's decision conforms to the law, is supported by competent evidence, and is neither arbitrary, capricious, nor unreasonable.

CONCLUSION

The TERC did not err in finding that the market areas as drawn by the county assessor complied with professionally accepted methodology.

AFFIRMED.

EDMON T. HOLMES, APPELLANT, V. CHIEF INDUSTRIES, INC., APPELLEE.

747 N.W.2d 24

Filed March 18, 2008. No. A-07-550.

1. **Workers' Compensation: Appeal and Error.** An appellate court may modify, reverse, or set aside a Workers' Compensation Court decision only when (1) the compensation court acted without or in excess of its powers; (2) the judgment, order, or award was procured by fraud; (3) there is not sufficient competent evidence in the record to warrant the making of the order, judgment, or award; or (4) the findings of fact by the compensation court do not support the order or award.
2. ____: ____. Upon appellate review, the findings of fact made by the trial judge of the compensation court have the effect of a jury verdict and will not be disturbed unless clearly wrong.
3. **Statutes.** Statutory interpretation presents a question of law.
4. **Workers' Compensation: Appeal and Error.** With respect to questions of law in workers' compensation cases, an appellate court is obligated to make its own determination.
5. **Workers' Compensation.** All amounts paid by an employer or by an insurance company carrying such risk, as the case may be, and received by the employee or his or her dependents by lump-sum payments, approved by order pursuant to Neb. Rev. Stat. § 48-139 (Reissue 2004), shall be final, but the amount of any agreement or award payable periodically may be modified at any time by agreement of the parties with the approval of the Nebraska Workers' Compensation Court.
6. **Judgments.** The meaning of a judgment is determined, as a matter of law, by its contents.
7. ____. In the absence of an ambiguity, the effect of a judgment must be declared in light of the literal meaning of language used.
8. ____. If the language of a judgment is ambiguous, there is room for construction.
9. ____. In ascertaining the meaning of an ambiguous judgment, resort may be had to the entire record.
10. **Judgments: Words and Phrases.** A judgment is ambiguous if a word, phrase, or provision has at least two reasonable but conflicting meanings.
11. **Judgments.** The fact that the parties have suggested opposing meanings of a disputed instrument does not necessarily compel the conclusion that the instrument is ambiguous.
12. **Workers' Compensation.** An employer cannot unilaterally change an employee's workers' compensation benefits.

Appeal from the Workers' Compensation Court. Reversed and remanded with directions.

Brenda S. Spilker and Amanda A. Dutton, of Baylor, Evnen, Curtiss, Grimit & Witt, L.L.P., for appellant.

Mark A. Fahleson and Sarah S. Pillen, of Rembolt Ludtke, L.L.P., for appellee.

SIEVERS, CARLSON, and MOORE, Judges.

SIEVERS, Judge.

Chief Industries, Inc. (Chief), sought and obtained a reduction in Edmon T. Holmes' workers' compensation benefits via an order from a Nebraska Workers' Compensation Court trial judge. Holmes appealed this order to a compensation court review panel that found that Holmes' award had been modified by agreement of the parties pursuant to Neb. Rev. Stat. § 48-141(1) (Reissue 2004), and as a result, the trial judge's reduction of benefits was affirmed. Holmes has now appealed to this court, arguing that no such modification ever occurred.

FACTUAL AND PROCEDURAL BACKGROUND

On September 10, 1997, and September 4, 1998, Holmes was employed as a truckdriver by Chief. On both of those dates, Holmes sustained a compensable injury while on the job, the details of which are not pertinent to this appeal. On March 22, 2000, the compensation court entered an award for Holmes. The relevant portions of that award for this appeal are as follows:

> At the time of the accident and injury of September 10, 1997, [Holmes] was receiving an average weekly wage of $340.63 being sufficient to entitle him to benefits of $227.09 for temporary total disability from September 11, 1997 through October 6, 1997, July 23, 1998 through August 6, 1998 and May 26, 1999 through the date of hearing and *for so long in the future as* [*Holmes*] *shall remain temporarily totally disabled.*

(Emphasis supplied.)

On October 9, 2003, Holmes' former attorney, Tony Brock, made a motion to the compensation court for an order approving a lien for attorney fees. On October 16, the compensation court held a hearing in which Chief and Brock participated, but Holmes was not in attendance or represented. Brock had stated in his motion for approval of an attorney's lien that he no longer represented Holmes, and thus he was only appearing for

himself. On October 24, the court entered an order finding that Brock was entitled to a lien. The order provided that "Brock represented that [Holmes] now receives permanent indemnity of $45.42 per week which entitles . . . Brock to an attorney's fee of $15.14 per week." Chief consequently reduced Holmes' periodic disability payments by an amount equal to Brock's attorney's lien.

On January 4, 2006, Holmes filed a motion with the compensation court, asserting, among other things, that no modification had been made to the March 22, 2000, award, which as set forth above gave him a "running" award of temporary total disability (TTD), but that Chief had failed to pay Holmes his weekly benefits required by the running award of TTD. On August 14, 2006, the compensation court trial judge entered an order which found, among other things, that in accordance with § 48-141, a modification had been made to the original award.

Holmes timely appealed the August 14, 2006, order to a compensation court review panel, which affirmed the trial judge's order and dismissed the appeal, citing our decision in *Davis v. Crete Carrier Corp.*, 15 Neb. App. 241, 725 N.W.2d 562 (2006). Holmes now appeals to this court.

ASSIGNMENT OF ERROR

Holmes assigns error to the compensation court's finding that the order of October 24, 2003, was a modification of the March 22, 2000, award, pursuant to § 48-141(1).

STANDARD OF REVIEW

[1-4] Pursuant to Neb. Rev. Stat. § 48-185 (Reissue 2004), an appellate court may modify, reverse, or set aside a Workers' Compensation Court decision only when (1) the compensation court acted without or in excess of its powers; (2) the judgment, order, or award was procured by fraud; (3) there is not sufficient competent evidence in the record to warrant the making of the order, judgment, or award; or (4) the findings of fact by the compensation court do not support the order or award. *Ortiz v. Cement Products*, 270 Neb. 787, 708 N.W.2d 610 (2005). Upon appellate review, the findings of fact made by the trial judge of the compensation court have the effect of a jury verdict and will

not be disturbed unless clearly wrong. *Id.* Statutory interpretation presents a question of law. *Id.* With respect to questions of law in workers' compensation cases, an appellate court is obligated to make its own determination. *Id.*

ANALYSIS

[5] Holmes contends that there was no modification of the March 22, 2000, award of continuing TTD payments and that the order of October 24, 2003, awarding Brock an attorney's lien is not a modification of the March 22, 2000, award, pursuant to § 48-141. Resolution of this issue requires us to determine the meaning of the October 24, 2003, order as it relates to the provisions of § 48-141. This presents a question of law about which we must make our own determination. See *Ortiz v. Cement Products, supra.* The pertinent portion of § 48-141 provides:

> All amounts paid by an employer or by an insurance company carrying such risk, as the case may be, and received by the employee or his or her dependents by lump-sum payments, approved by order pursuant to section 48-139, shall be final, *but the amount of any agreement or award payable periodically may be modified as follows: (1) At any time by agreement of the parties with the approval of the Nebraska Workers' Compensation Court*[.]

(Emphasis supplied.)

[6-11] We now turn to the meaning of the compensation court's judgment entered on October 24, 2003, with respect to Brock's application for an attorney's lien. The meaning of a judgment is determined, as a matter of law, by its contents. See *Kerndt v. Ronan*, 236 Neb. 26, 458 N.W.2d 466 (1990). In the absence of an ambiguity, the effect of a judgment must be declared in light of the literal meaning of language used. *Dougherty v. Swift-Eckrich*, 251 Neb. 333, 557 N.W.2d 31 (1996). If the language of a judgment is ambiguous, there is room for construction. *Label Concepts v. Westendorf Plastics*, 247 Neb. 560, 528 N.W.2d 335 (1995). In ascertaining the meaning of an ambiguous judgment, resort may be had to the entire record. *Id.* A judgment is ambiguous if a word, phrase, or provision has at least two reasonable but conflicting meanings.

See *Shivvers v. American Family Ins. Co.*, 256 Neb. 159, 589 N.W.2d 129 (1999); *Kerndt v. Ronan, supra*. However, the fact that the parties have suggested opposing meanings of the disputed instrument does not necessarily compel the conclusion that the instrument is ambiguous. *Fraternal Order of Police v. County of Douglas*, 259 Neb. 822, 612 N.W.2d 483 (2000).

With these background principles in place, we turn to *Davis v. Crete Carrier Corp.*, 15 Neb. App. 241, 725 N.W.2d 562 (2006), relied upon by the review panel. *Davis* is helpful in determining whether the October 24, 2003, order of the compensation court constituted a modification of the award of March 22, 2000, under § 48-141(1).

In *Davis v. Crete Carrier Corp., supra*, John Davis had suffered a compensable injury while working for Crete Carrier Corporation (Crete), which injury resulted in an award. Davis' initial award entitled him to disability benefits "'for so long in the future as [Davis] shall remain totally disabled as a result of [this] accident and injury.'" *Id.* at 255, 725 N.W.2d at 574. Subsequently, Davis and Crete filed a vocational rehabilitation plan that included a stipulation providing that "Davis and [Crete] 'do agree to the above [vocational rehabilitation] plan and hereby stipulate to the entry of an Order requiring the payment of temporary disability compensation to [Davis] while [he] is undergoing the vocational rehabilitation plan.'" *Id.* (emphasis omitted). Clearly, in *Davis*, the parties stipulated to a specific rehabilitation plan, as well as for payment of TTD benefits "while" Davis was pursuing the plan. Pursuant to this stipulation, the trial court entered an order which provided that Crete was to pay Davis temporary disability benefits while he underwent vocational rehabilitation—the obvious corollary of which was "if not in the plan, no TTD."

When Davis completed his vocational rehabilitation, Crete ceased paying him temporary disability benefits. Davis made a motion to the compensation court, alleging that Crete had unilaterally ceased paying him benefits and was in arrears. Crete argued that the previous stipulation that payment of benefits would run until Davis completed vocational rehabilitation, and the court's order that memorialized that stipulation, had modified the original award by agreement in accordance

with § 48-141(1). We found that Crete was correct, that is, that the underlying stipulation constituted an agreement between the parties pursuant to § 48-141(1), that such agreement was approved by the compensation court, and that thus the original award had been modified. Reduced to its essence, *Davis* finds that the parties' stipulation had set an "end date" for TTD benefits, marked by either the completion of the specific plan or Davis' failure to complete it—thus the importance of the stipulation for payment of TTD benefits only "while" he was in the specifically agreed-to plan. This is materially different from the "running award of TTD" held by Holmes; it goes without saying that a stipulation between the parties is an "agreement," and in *Davis*, the stipulation was approved and implemented by the compensation court's decision. None of these things are present in the instant case.

Consequently, the compensation court incorrectly relied on *Davis* to find that there was a modifying agreement. The compensation court's rationale was as follows, but it is fundamentally flawed given the facts of the present case:

> [T]he submission by the parties of the issue of counsel's lien, and the Court's subsequent order approving payment of permanent disability benefits in specific amounts to counsel and [Holmes], arguably satisfies § 48-141. In other words, the Court, in its order of October 24, 2003, directed the payment of permanent disability benefits to [Holmes] based upon the obvious agreement of the parties which, in effect, modified the previous Award.

However, nowhere in the record can we locate the "obvious agreement" the compensation court judge references. To find an agreement, the trial judge used the representations of Brock, Holmes' former attorney, made at the October 16, 2003, hearing that Holmes was "now" receiving permanent disability. But, Brock was not representing Holmes at the time, Holmes was not present, and as a matter of law, former counsel's representations to the court about the status of his former client's case and his present benefits, absent appropriate authorization, cannot create a modifying agreement between the parties to the award, namely, Holmes and Chief. Put another way, Brock lacked the authority to bind his former client to anything. In short, what

the trial judge said was an "obvious agreement of the parties" is not in evidence, and could not be formed by Holmes' former lawyer, who was appearing only to secure an attorney's lien and had no authority to bind Holmes to a modification of his running award of TTD.

[12] Chief asserts in its brief that an agreement between the parties did occur, but the evidence it uses to support this assertion is lacking as a matter of law. Chief claims that in the court's statement in its October 24, 2003, order that "Brock represented that [Holmes] now receives permanent indemnity," the use of the word "now" demonstrates that a modification had occurred. But, at best, Brock's statement merely characterizes the category of benefits Brock's former client was getting at the time of the lien hearing, and whose characterization he was repeating is unknown. The fact that Chief may have unilaterally changed Holmes' benefits from TTD to permanent partial disability benefits does not constitute a court-approved agreement for modification. As we noted in *Davis v. Crete Carrier Corp.*, 15 Neb. App. 241, 725 N.W.2d 562 (2006), the employer cannot unilaterally change the worker's benefits. See *ITT Hartford v. Rodriguez*, 249 Neb. 445, 543 N.W.2d 740 (1996) (employer was not free to unilaterally determine, based on information received from physician, that employee was no longer temporarily totally disabled).

Brock's use of the term "now receives" could implicitly be contrasted against "back then, before the award was modified." In other words, while Chief could have "modified" the amount of money it was paying Holmes, mere unilateral modification does not satisfy the requirements of § 48-141(1). In the final analysis of this case, there is simply no evidence of an agreement between Holmes and Chief to modify the running award.

Therefore, in the context of Brock's seeking a lien against Holmes' benefits, the representation of what Holmes "now receives" allows, at most, the court to determine the amount that Brock should be paid by Chief for his lien from present benefits—but it does not prove the existence of the prerequisite agreement of the parties that has been approved by the court, as is required under § 48-141(1). Chief's further argument, that the inclusion of Chief's attorney in the October 16,

2003, hearing shows that the hearing was not intended solely to address the issue of Brock's attorney's lien, is not persuasive. Regardless of why Chief's lawyer was there, Holmes was not there and could not be bound by what his former lawyer told the judge, which would not be evidence in any event. Moreover, the pleading generating the hearing, Brock's motion for approval of an attorney's lien, quite obviously "sets the agenda" for the hearing—which was only Brock's entitlement to an attorney's lien. Whether Holmes and Chief had agreed to a modification of Holmes' running award of TTD, which agreement should be approved at the hearing under § 48-141(1), was not noticed for hearing, and no evidence was introduced at the hearing on that subject.

Therefore, because no agreement existed between Holmes and Chief regarding a modification of the March 22, 2000, award, we find that the compensation court erred when it found that such a modification had occurred.

CONCLUSION

For the reasons stated above, we reverse the compensation court's finding that the October 24, 2003, order modified the March 22, 2000, award. We remand this cause to the compensation court review panel with directions to vacate its dismissal of Holmes' appeal and for such panel to remand the cause to the trial judge for further proceedings consistent with this opinion.

REVERSED AND REMANDED WITH DIRECTIONS.

WESLEY J. JONES, AN INDIVIDUAL, APPELLEE, V. DANIEL F. STAHR AND GEORGIA A. STAHR, HUSBAND AND WIFE, APPELLANTS, THERESE DORENBACH, APPELLEE, AND LARRY COFFEY, INTERVENOR-APPELLANT.

746 N.W.2d 394

Filed March 25, 2008. No. A-06-572.

1. **Specific Performance: Equity: Appeal and Error.** An action for specific performance sounds in equity, and on appeal, an appellate court decides factual questions de novo on the record.

2. **Specific Performance: Appeal and Error.** When considering an appeal in an action for specific performance, an appellate court will resolve questions of fact and law independently of the trial court's conclusions.
3. **Equity: Appeal and Error.** In reviewing an equity action, when credible evidence is in conflict on material issues of fact, the court may consider and give weight to the fact that the trial court observed the witnesses and accepted one version of the facts over another.
4. **Contracts: Offers to Buy or Sell.** A right of first refusal has no binding effect unless the offeror decides to sell.
5. **Contracts: Options to Buy or Sell: Assignments.** The option holder's rights in an option supported by consideration are assignable in the absence of any words of assignability, except, of course, where the nature or terms of the option bring it within some recognized exception.
6. **Contracts: Real Estate: Offers to Buy or Sell.** Acceptance of an offer to buy or sell real estate must be an unconditional acceptance of the offer as made; otherwise, no contract is formed; and there must be no substantial variation between the offer and the acceptance, since if such acceptance differs from the offer or is coupled with any condition that varies or adds to it, it is not an acceptance, but a counterproposition.

Appeal from the District Court for Lancaster County: JEFFRE CHEUVRONT, Judge. Reversed and remanded with direction.

William G. Blake and Jason L. Scott, of Pierson, Fitchett, Hunzeker, Blake & Katt, for appellants and intervenor-appellant.

Shannon R. Harner and Susan M. Napolitano, of Hoppe & Harner, L.L.P., for appellee Wesley J. Jones.

Darrell K. Stock, of Snyder & Stock, for appellee Therese Dorenbach.

INBODY, Chief Judge, and CARLSON and CASSEL, Judges.

CASSEL, Judge.

INTRODUCTION

This appeal addresses whether a right of first refusal to purchase real estate remains personal in nature after the seller has decided both to sell the entire remaining property and to accept the terms and conditions specified by a potential buyer. We conclude that upon the concurrence of these events, the right of first refusal ripens into an option. Because such options are

ordinarily assignable, a provision in the option holder's acceptance reserving the right to assign does not constitute a material deviation. We reverse, and remand with direction.

BACKGROUND

The relevant facts are not in dispute. On February 14, 1998, Therese Dorenbach entered into an agreement with Daniel F. Stahr and Georgia A. Stahr, husband and wife, for the sale of Dorenbach's real property at 7800 N.W. 70th Street, Malcolm, Nebraska. The purchase agreement contained the following language:

> Buyer [the Stahrs] acknowledges that Seller [Dorenbach] has previously granted to Gary Aerts a right of first refusal to fifteen (15) acres adjacent to Property. . . . However, subject to that right of first refusal held by Gary Aerts, Seller [Dorenbach] does grant a subordinate right of first refusal to Buyer [the Stahrs] on the land retained by Seller [Dorenbach], comprising approximately one hundred twenty seven (127) acres, more or less.

On or about April 17, the Stahrs took title to the property at 7800 N.W. 70th Street.

On or about June 14, 2005, Dorenbach listed her remaining property, located at 7900 N.W. 70th Street, with a real estate broker. The broker sent a letter to the Stahrs telling them that Dorenbach had listed the property and that once an offer came in, they would be given 24 hours to match or exceed the purchase price.

On June 27, 2005, Wesley J. Jones submitted an offer to Dorenbach to purchase the property. Jones offered Dorenbach $550,000 for the property, and his offer was conditioned upon his ability to obtain a $400,000 loan. On June 28, Dorenbach accepted Jones' offer. The next day, Swanson telephoned the Stahrs and provided them with a copy of Jones' purchase offer. On the morning of June 30, the Stahrs' agent delivered a purchase agreement, dated June 29, 2005, to Dorenbach stating that they wished to purchase the property for the same price. In the Stahrs' agreement, they stated that they would be paying the purchase price entirely in cash, and the Stahrs inserted the following language in an addendum to their purchase agreement:

"Buyer [the Stahrs] reserves the right to assign this contract to a third party prior to closing."

In a letter dated July 20, 2005, Dorenbach's attorney informed the Stahrs that their offer was not acceptable, given that the offer provided for the Stahrs to be able to assign the contract to a third party prior to closing. Specifically, the letter states:

> When this was entered into, [Dorenbach] intended the right of refusal to be personal to you and she is not willing to allow it to be assigned in any manner. [Dorenbach] is also bothered by the fact that your purchase agreement indicates that the payment will be "all cash," yet it has come to our attention that there will be a loan from Hastings State Bank which has some contingencies.

The letter also states that Dorenbach had received a revised offer from Jones, and it told the Stahrs they had 24 hours within which to agree to or exceed the terms of Jones' second offer. The Stahrs then notified Dorenbach that they would stand on the exercise of their right of first refusal made in response to Jones' initial offer and that they were ready, willing, and able to close on the purchase of the property. The record shows that Dorenbach did not sell the property to Jones or the Stahrs, but that Gary Aerts exercised his right of first refusal and purchased 15 acres from Dorenbach.

On August 31, 2005, Jones filed his complaint against the Stahrs and Dorenbach seeking declaratory judgment determining the rights and duties of the parties under the contracts. The Stahrs filed an answer, counterclaim, and cross-claim seeking to enforce their offer to purchase Dorenbach's property. Subsequently, the Stahrs assigned any rights they had to purchase Dorenbach's property to Larry Coffey and Coffey filed a complaint in intervention in the action. Dorenbach's amended cross-claim and counterclaim alleges that the right of first refusal was personal to the Stahrs, and Dorenbach sought to have the Stahrs' right of first refusal declared invalid.

Trial was held on March 28, 2006. Dorenbach testified that when negotiating with Daniel in 1998 for the sale of her land at 7800 N.W. 70th Street, Daniel brought up the idea of the right of first refusal. Dorenbach stated that Daniel indicated that he wanted the right of first refusal for himself. Dorenbach testified

that she and Daniel did not discuss the Stahrs' ability to assign the right. Dorenbach testified that she gave the Stahrs the first right of refusal "on the feeling that in good faith it was for [Daniel] and [Daniel] only." Dorenbach testified that she would not have agreed to the right of first refusal if it had contained language allowing the right to be assigned. Dorenbach testified that she granted Aerts a right of first refusal to 15 acres of her property because Aerts, her neighbor, told her that he wanted to buy additional property adjacent to his own so that no one could build close to his property.

Dorenbach stated that in the 1998 purchase agreement with the Stahrs, she included a provision stating that the Stahrs were granted the right to hunt on Dorenbach's land. The provision states, "Buyer [the Stahrs] understands that this right to hunt is not exclusive and other hunters, including but not limited to family members of Seller [Dorenbach], will be hunting on Seller's [Dorenbach's] adjacent land at various times." The 1998 agreement also states that the Stahrs asked to erect a sign on Dorenbach's land at the northeast corner of the intersection of N.W. 70th Street and U.S. Highway 34, and Dorenbach agreed, but the agreement stated, "This right is specific to the current Buyer [the Stahrs] and is not assignable or transferrable."

Daniel testified that he spoke to Dorenbach's son about the right of first refusal and mentioned that he wanted to have the option to purchase the property adjacent to the land he purchased from Dorenbach in 1998 if he could afford it. Daniel testified that he and Dorenbach never discussed whether the right of first refusal would be assignable. Daniel testified that the Stahrs intended their June 29, 2005, offer to purchase Dorenbach's property to meet the terms of Jones' offer without significantly varying from those terms. Daniel testified that he remained ready, willing, and able to do what is necessary to close on the purchase of Dorenbach's property on the terms of the June 29 purchase offer.

In an order filed April 24, 2006, the trial court dismissed Jones from the action, stating that he lacked standing to challenge the Stahrs' exercise of the right of first refusal. The court found in favor of Dorenbach, granting her amended cross-claim and counterclaim and stating that the Stahrs' offer to purchase

dated June 29, 2005, was an invalid exercise of the Stahrs' right of first refusal. The court dismissed the Stahrs' and Coffey's claims.

In doing so, the trial court stated:

> The inescapable conclusion is that Dorenbach granted the rights of first refusal to Aerts and the Stahrs to allow them to acquire the land adjacent to their homes rather than have the land be acquired by a third party. In other words, these rights of first refusal permitted Aerts and the Stahrs to have some control over the ownership of the land adjacent to their homes. The court finds that the right of first refusal was personal to the Stahrs and was not assignable. Therefore, when their June 29, 2005 offer to purchase included the provision for assignment, this constituted a material deviation from the offer by Jones and it is not binding upon Dorenbach.

The Stahrs and Coffey appeal.

ASSIGNMENTS OF ERROR

On appeal, the Stahrs and Coffey argue that the trial court erred (1) in finding that the right of first refusal granted to the Stahrs was personal and could not be assigned and in basing its decision on testimony from Dorenbach, (2) in finding that the Stahrs did not have a valid and enforceable agreement to purchase the property from Dorenbach because they inserted language into the purchase agreement reserving their right to assign their interest in the agreement prior to closing, and (3) in finding that the Stahrs' exercise of their right of first refusal was invalid because it was a material deviation from the offer made by Jones.

STANDARD OF REVIEW

[1-3] An action for specific performance sounds in equity, and on appeal, an appellate court decides factual questions de novo on the record. See *Mogensen v. Mogensen*, 273 Neb. 208, 729 N.W.2d 44 (2007). When considering an appeal in an action for specific performance, an appellate court will resolve questions of fact and law independently of the trial court's conclusions. See *id.* In reviewing an equity action, when

credible evidence is in conflict on material issues of fact, the court may consider and give weight to the fact that the trial court observed the witnesses and accepted one version of the facts over another. See *id.*

ANALYSIS

Right of First Refusal.

On appeal, the Stahrs and Coffey argue that the trial court erred in finding that the right of first refusal granted to the Stahrs by Dorenbach was personal in nature and could not be assigned. Dorenbach disagrees and cites *Schupack v. McDonald's System, Inc.*, 200 Neb. 485, 264 N.W.2d 827 (1978), in support of her position. Although generally the law supports assignability of rights, it does not permit assignments for matters of personal trust or confidence, or for personal services. See *id.*

The district court recognized that in the absence of language indicating that a right of first refusal is assignable or would pass to the grantee's heirs, the right is personal. As the Maryland Court of Appeals explained in *Park Station v. Bosse*, 378 Md. 122, 835 A.2d 646 (2003), rights of first refusal are presumed to be personal and are not ordinarily construed as transferable or assignable unless the particular clause granting the right refers to successors or assigns or the instrument otherwise shows that the right was intended to be transferable or assignable. The opinion of the Maryland court cites numerous supporting cases from many jurisdictions. Accord, 77 Am. Jur. 2d *Vendor and Purchaser* § 34 (2006); Jonathan F. Mitchell, *Can a Right of First Refusal Be Assigned?*, 68 U. Chi. L. Rev. 985 (2001); 3 Eric Mills Holmes, Corbin on Contracts § 11.15 (Joseph M. Perillo ed., rev. ed. 1996).

Although many of the decisions from other jurisdictions presume the right is personal in order to avoid a conflict with the rule against perpetuities, other reasons also support the rule. For example, the court in *Old Nat'l Bank v. Arneson*, 54 Wash. App. 717, 776 P.2d 145 (1989), explained that the holder of a right of first refusal holds only a general contract right to acquire a later interest in real estate should the property owner decide to sell. In that event, a new contract ensues under which the preemptive holder may receive an interest in land.

Significance of Decisions to Sell and to Accept Terms.

While the district court focused on the nature of the right of first refusal prior to Dorenbach's decisions to sell the remaining real estate and to accept the terms of Jones' offer, the court overlooked these decisions. Once Dorenbach determined to sell and found Jones' offer acceptable, the Stahrs' right of first refusal ripened into an option contract.

[4] In *Winberg v. Cimfel*, 248 Neb. 71, 532 N.W.2d 35 (1995), the Nebraska Supreme Court relied upon the distinction between an option and a right of first refusal discussed in a treatise by Samuel Williston. As the court noted, a right of first refusal has no binding effect unless the offeror decides to sell. "The 'right of first refusal' or 'preemption' is conditioned upon the willingness of the owner to sell; it can be enforced by specific performance where such willingness can be proved." 25 Samuel Williston, A Treatise on the Law of Contracts § 67:85 at 503-04 (Richard A. Lord ed., 4th ed. 2002). Stated another way, "the right is subject to an agreed condition precedent, typically the owner's receipt of an offer from a third party and the owner's good-faith decision to accept it." 3 Holmes, *supra*, § 11.3 at 470.

"[T]he occurrence of these events (owner's receipt of an offer and the good-faith decision to accept it) satisfies the condition precedent, which 'triggers' the right of first refusal that 'ripens' into an option." *Id.* at 470-71. See, e.g., *Smith v. Hevro Realty Corp.*, 199 Conn. 330, 507 A.2d 980 (1986).

[5] "In nearly all jurisdictions the option holder's rights in an option supported by consideration are assignable in the absence of any words of assignability, except of course, where the nature or terms of the option bring it within some recognized exception." 3 Holmes, *supra*, § 11.15 at 586.

We do not read the decision of the Nebraska Supreme Court in *Schupack v. McDonald's System, Inc.*, 200 Neb. 485, 264 N.W.2d 827 (1978), as inconsistent with the law of other jurisdictions. In *Schupack*, the plaintiffs brought suit against McDonald's Corporation and McDonald's System, Inc. (collectively McDonald's), seeking a declaratory judgment to determine the respective rights and obligations of the parties under a right of first refusal originally granted by McDonald's

to Bernard L. Copeland. The plaintiffs contended that the right of first refusal was transferred and conveyed to them in 1964 by Copeland and his partner when they sold all their interest in various McDonald's franchises in Omaha, Nebraska, and Council Bluffs, Iowa, to the plaintiffs. In other words, the assignment occurred before McDonald's had decided to develop additional locations. Moreover, as we observe below, the *Schupack* decision was driven by the continuing nature of the franchise relationship.

The right of first refusal in *Schupack* allowed the possessor of the right of first refusal to acquire additional McDonald's franchises which might be developed in the future by McDonald's in the Omaha-Council Bluffs area. The suit arose because McDonald's granted a franchise in Bellevue, Nebraska, to someone other than the plaintiffs. The district court determined that the right of first refusal was not personal to Copeland and his partner, but that the Omaha area did not encompass Bellevue. McDonald's appealed, and the plaintiffs cross-appealed.

The Supreme Court held that the right of first refusal was intended to be personal in nature to Copeland and could not be transferred or assigned without the consent of McDonald's and that McDonald's had not consented to a transfer of the right of first refusal from Copeland to the plaintiffs. Therefore, the Supreme Court held that the plaintiffs possessed no right of first refusal to additional McDonald's franchises in the Omaha-Council Bluffs area and dismissed the plaintiffs' action.

In doing so, the Supreme Court noted that whether a right of first refusal is personal and thus not assignable without the consent of the grantor is to be resolved by ascertaining the intent of the parties to the transaction. Additionally, the court stated that the intention of the parties is to be ascertained from the contract, its nature, and the attending circumstances. *Id.* The *Schupack* decision addressed franchise rights rather than an interest in real estate. A poorly managed franchise can stain the reputation of the remainder of a nationwide chain of such businesses. The relationship between franchisor and franchisee is usually continuing in nature.

On the other hand, where the seller is disposing of his or her entire interest in real estate, the decision to sell severs any

such continuing relationship. Dorenbach does not argue that she would have any continuing relationship to the property or to the Stahrs after the sale was completed. We assume that prior to any decision by Dorenbach to sell the real estate, the right of first refusal remained personal to the Stahrs. But once she decided both to sell the real estate and to accept the terms of Jones' offer, the Stahrs' right of first refusal ripened into an option. The Stahrs exercised the option by tendering their acceptance to Dorenbach.

Material Deviation.

The Stahrs and Coffey argue that the trial court erred in finding that the Stahrs did not have a valid and enforceable agreement to purchase the property from Dorenbach because they inserted language into the purchase agreement reserving their right to assign their interest in the agreement prior to closing. They also contend that the trial court erred in finding that the exercise of the Stahrs' right of first refusal was invalid because it was a material deviation from the offer made by Jones.

[6] Acceptance of an offer to buy or sell real estate must be an unconditional acceptance of the offer as made; otherwise, no contract is formed; and there must be no substantial variation between the offer and the acceptance, since if such acceptance differs from the offer or is coupled with any condition that varies or adds to it, it is not an acceptance, but a counterproposition. See *Anderson v. Stewart*, 149 Neb. 660, 32 N.W.2d 140 (1948). See, also, *Logan Ranch v. Farm Credit Bank*, 238 Neb. 814, 472 N.W.2d 704 (1991).

As we have already described, there is no dispute that Dorenbach decided to sell, that she received an offer from Jones, and that she decided to accept the offer. At that time, the Stahrs' right of first refusal ripened into an option, which they then proceeded to exercise. As such options are assignable by the option holder, the language of the Stahrs' acceptance, which merely reserved the right to assign, did not constitute a material variation from Jones' offer.

At oral argument, Dorenbach's counsel conceded that if the Stahrs' right was assignable, the contested provision did not constitute a material variation. While it may not have been

assignable before Dorenbach decided to accept Jones' offer, once she did, the right of first refusal ripened into an assignable option. It follows that the Stahrs' acceptance was binding and that the "ripened option" thereby became an enforceable contract. The district court erred in finding that the reservation of the right to assign constituted a material deviation from the terms of Jones' offer.

CONCLUSION

When Dorenbach decided both to sell the real estate and to accept Jones' offer, the Stahrs' right of first refusal ripened into an option contract. Because option contracts are assignable by the optionee, the Stahrs' reservation of the right to assign was not a material deviation from Jones' offer. The district court erred in finding a material deviation. We reverse the judgment of the district court and remand with direction to grant specific performance to the Stahrs.

REVERSED AND REMANDED WITH DIRECTION.

CARLSON, Judge, dissenting.

I respectfully dissent from the majority's opinion, given my conclusion that regardless of whether the Stahrs' ability to purchase Dorenbach's property is considered a right of first refusal or an "option," there is sufficient evidence on this record to show that the Stahrs' right, or option, to purchase Dorenbach's property was too personal in character to permit assignment.

The majority states that the Stahrs' right of first refusal ripened into an option once Dorenbach accepted Jones' offer to purchase. Assuming that this is true, one must still consider whether the Stahrs' option to purchase Dorenbach's property was assignable. As the majority states, "In nearly all jurisdictions the option holder's rights in an option supported by consideration are assignable in the absence of any words of assignability, except of course, where the nature or terms of the option bring it within some recognized exception." 3 Eric Mills Holmes, Corbin on Contracts § 11.15 at 586 (Joseph M. Perillo ed., rev. ed. 1996).

Although generally the law supports assignability of rights, it does not permit assignments for matters of personal trust or confidence, or for personal services. *Eli's, Inc. v. Lemen*,

256 Neb. 515, 591 N.W.2d 543 (1999), citing *Schupack v. McDonald's System, Inc.*, 200 Neb. 485, 264 N.W.2d 827 (1978); *Earth Science Labs. v. Adkins & Wondra, P.C.*, 246 Neb. 798, 523 N.W.2d 254 (1994); *Andersen v. Ganz*, 6 Neb. App. 224, 572 N.W.2d 414 (1997).

The Nebraska Supreme Court has stated that whether rights and duties under a contract are too personal in character to permit assignment is a question of construction to be resolved from the nature of the contract and the express or presumed intention of the parties. *Schupack v. McDonald's System, Inc., supra*. Additionally, the court stated that the intention of the parties is to be ascertained from the contract, its nature, and the attending circumstances. *Id.*

In the instant case, the right of first refusal granted by Dorenbach to the Stahrs states as follows:

> Buyer [the Stahrs] acknowledges that Seller [Dorenbach] has previously granted to . . . Aerts a right of first refusal to fifteen (15) acres adjacent to Property. . . . However, subject to that right of first refusal held by . . . Aerts, Seller [Dorenbach] does grant a subordinate right of first refusal to Buyer [the Stahrs] on the land retained by Seller [Dorenbach], comprising approximately one hundred twenty seven (127) acres, more or less.

The record shows that on June 27, 2005, Jones submitted an offer to Dorenbach to purchase her remaining property. Jones offered Dorenbach $550,000 for the property, and his offer was conditioned upon his ability to obtain a $400,000 loan. On June 28, Dorenbach accepted Jones' offer. The Stahrs then exercised their right of first refusal, offering to purchase Dorenbach's property for the same price. In the Stahrs' agreement, they stated that they would be paying the purchase price entirely in cash, and the Stahrs inserted the following language in their purchase agreement: "Buyer [the Stahrs] reserves the right to assign this contract to a third party prior to closing."

In a letter dated July 20, 2005, Dorenbach's attorney informed the Stahrs that their offer was not acceptable; specifically, the letter states:

> When this was entered into, [Dorenbach] intended the right of refusal to be personal to you and she is not willing

> to allow it to be assigned in any manner. [Dorenbach] is also bothered by the fact that your purchase agreement indicates that the payment will be "all cash," yet it has come to our attention that there will be a loan from Hastings State Bank which has some contingencies.

At trial, Dorenbach testified that when negotiating with Daniel in 1998 for the sale of her land, Daniel brought up the idea of the right of first refusal. Dorenbach stated that Daniel indicated that he wanted the right of first refusal for himself. Dorenbach testified that she and Daniel did not discuss the Stahrs' ability to assign the right. Dorenbach testified that she gave the Stahrs the first right of refusal "on the feeling that in good faith it was for [Daniel] and [Daniel] only." Dorenbach testified that she would not have agreed to the right of first refusal if it had contained language allowing the right to be assigned.

Dorenbach testified that she granted Aerts a right of first refusal to 15 acres of her property because Aerts, her neighbor, told her that he wanted to buy additional property adjacent to his own so that no one could build close to his property. Daniel testified that when he spoke to Dorenbach's son about the right of first refusal, Daniel mentioned that he wanted to have the option to purchase the property adjacent to the land he purchased from Dorenbach in 1998 if he could afford it. Daniel testified that he and Dorenbach never discussed whether the right of first refusal would be assignable.

In the instant case, the trial court reviewed the right of refusal Dorenbach granted to the Stahrs, its nature, and the attending circumstances in concluding that the right of first refusal Dorenbach granted to the Stahrs in 1998 was personal in nature and could not be assigned by the Stahrs. The trial court relied on Dorenbach's testimony at trial that she considered the right to be personal to the Stahrs and that she did not want the right of first refusal to be assigned. The trial court went on to state:

> The inescapable conclusion is that Dorenbach granted the rights of first refusal to Aerts and the Stahrs to allow them to acquire the land adjacent to their homes rather than have the land be acquired by a third party. In other words, these rights of first refusal permitted Aerts and

> the Stahrs to have some control over the ownership of the land adjacent to their homes. The court finds that the right of first refusal was personal to the Stahrs and was not assignable.

After reviewing de novo the trial court's determination that the right of first refusal was personal, and keeping in mind that the trial court observed the witnesses and accepted Dorenbach's version of the facts, I cannot say that the trial court erred in so finding.

After concluding that the right of first refusal was personal in nature, the trial court stated, "Therefore, when [the Stahrs'] June 29, 2005 offer to purchase included the provision for assignment, this constituted a material deviation from the offer by Jones and it is not binding upon Dorenbach." Given my conclusion that the trial court did not err in finding that the right or option granted to the Stahrs by Dorenbach was personal in nature and not assignable, it follows that by virtue of the Stahrs' inserting language into the purchase agreement reserving their right to assign their interest in the agreement prior to closing, the Stahrs' exercise of that right of first refusal became invalid because it was a material deviation from the offer made by Jones.

Acceptance of an offer to buy or sell real estate must be an unconditional acceptance of the offer as made; otherwise, no contract is formed; and there must be no substantial variation between the offer and the acceptance, since if such acceptance differs from the offer or is coupled with any condition that varies or adds to it, it is not an acceptance, but a counterproposition. See *Anderson v. Stewart*, 149 Neb. 660, 32 N.W.2d 140 (1948). See, also, *Logan Ranch v. Farm Credit Bank*, 238 Neb. 814, 472 N.W.2d 704 (1991). I cannot conclude that the trial court erred in this regard either, and therefore, I would affirm the judgment of the trial court.

IN RE ESTATE OF MYRTLE ALICE REIMERS, DECEASED. JUDY WREHE, PERSONAL REPRESENTATIVE OF THE ESTATE OF MYRTLE ALICE REIMERS, DECEASED, APPELLEE, V. NEBRASKA DEPARTMENT OF HEALTH AND HUMAN SERVICES, APPELLANT.

746 N.W.2d 724

Filed March 25, 2008. No. A-07-261.

1. **Decedents' Estates: Appeal and Error.** Appeals of matters arising under the Nebraska Probate Code are reviewed for error on the record.
2. **Judgments: Appeal and Error.** When reviewing an order for errors appearing on the record, the inquiry is whether the decision conforms to the law, is supported by competent evidence, and is neither arbitrary, capricious, nor unreasonable.
3. **Administrative Law: Medical Assistance: Liability: Debtors and Creditors.** Under the Medical Assistance Act, Neb. Rev. Stat. § 68-901 et seq. (Cum. Supp. 2006 & Supp. 2007), commonly known as Medicaid, a recipient generally becomes indebted to the Nebraska Department of Health and Human Services for assistance payments.
4. **Administrative Law: Medical Assistance: Liability: Debtors and Creditors: Decedents' Estates.** While the debt arising under Neb. Rev. Stat. § 68-901 et seq. (Cum. Supp. 2006 & Supp. 2007) accrues during the recipient's lifetime, it is held in abeyance for payment, pursuant to § 68-919(2), until the recipient's death.
5. **Appeal and Error.** An issue not presented to or passed upon by the trial court is not an appropriate issue for consideration on appeal.
6. **Administrative Law: Records: Evidence.** The statute providing for admission of the Nebraska Department of Health and Human Services' payment record, Neb. Rev. Stat. § 68-919(4) (Supp. 2007), clearly dispenses with foundation for the admission of the record, if properly certified.
7. ____: ____: ____. Neb. Rev. Stat. § 68-919 (Supp. 2007) does not create any presumption that the amounts shown on the payment record of Nebraska's Department of Health and Human Services are reimbursable by the recipient's estate—such must still be proved, and if an exhibit does not do so, then additional evidence is needed.

Appeal from the County Court for Hall County: DAVID A. BUSH, Judge. Affirmed in part, and in part reversed and remanded.

Jon Bruning, Attorney General, and David M. McManaman, Special Assistant Attorney General, for appellant.

John R. Higgins, Jr., of Huston & Higgins, for appellee.

IRWIN, SIEVERS, and MOORE, Judges.

SIEVERS, Judge.

This appeal is from probate proceedings in the county court for Hall County involving the estate of Myrtle Alice Reimers who died in Hall County on March 22, 2005. After Reimers died, an informal probate proceeding was initiated. After the estate was opened, the Nebraska Department of Health and Human Services (DHHS) filed a claim for reimbursement of Medicaid payments in the amount of $79,163.48 made on behalf of Reimers during her lifetime. The county court held a hearing after which a written decision was rendered denying DHHS' claim in its entirety. DHHS has now perfected its appeal to this court. Briefing is completed, and we have ordered that this case be submitted for decision without oral argument pursuant to our authority under Neb. Ct. R. of Prac. 11B(1) (rev. 2005).

FACTUAL AND PROCEDURAL BACKGROUND

The bill of exceptions in this case is composed solely of exhibit 2, which is a document produced by DHHS that is 122 pages in length. The exhibit begins with a "Certification Statement" that certifies that "the attached and incorporated Client Detail Report (07/17/1994 through 12/31/1998), Client Expense Report, (dated 01/01/1999 through 03/31/2005), and Waiver Services report (dated 07/17/1994 through 03/31/2005), represent a true and accurate reflection of Medicaid payments made by [DHHS] Finance and Support on behalf of the client (patient) identified." Citing applicable Nebraska statutes, the first page of exhibit 2 asserts that repayment for the amounts sought shall be made directly to DHHS. The first page then has the following list of items for which reimbursement is sought that we reproduce verbatim:

Total of Client Expense Report (07/17/1994 to 12/31/1998):	$ 7,941.17
Total of Client Detail Report (01/01/1999 to 03/31/2005):	$53,616.99
Total of Waiver Services (07/17/1994 to 03/31/2005:	$17,605.32
Total Nebraska Medicaid Payment:	$79,163.48

The first page of the exhibit then recites "[DHHS,] Finance and Support[,] Dave Cygan - Authorized Representative" below what appears to be the signature of Dave Cygan. Affixed to the document, to the right of the description and signature, is the gold official seal of DHHS. The county court's decision notes the personal representative's objection to the admission in evidence of exhibit 2 based on lack of foundation, but overrules the objection, citing Neb. Rev. Stat. § 68-919(4) (Supp. 2007)—which statute we shall later discuss. The court said no further evidence was offered, and the matter was deemed submitted. The county court's decision on the merits of DHHS' claim for reimbursement states as follows:

> The [Estate] argues that without testimony as to the meaning of Exhibit "2", the Court cannot enter a determination regarding the amount of the claim of [DHHS]. [DHHS] argues that Exhibit "2" is sufficient proof of its claim. The matter is submitted.
>
> The Court being duly advised in the premises finds that the claim of [DHHS] should be and hereby is denied in the absence of further testimony or other evidence from [DHHS].

ASSIGNMENT OF ERROR

DHHS' sole assignment of error is simply that the county court erred when it disallowed the claim for reimbursement of medical assistance benefits provided to Reimers during her lifetime.

STANDARD OF REVIEW

[1,2] Appeals of matters arising under the Nebraska Probate Code are reviewed for error on the record. *In re Estate of Weingarten*, 10 Neb. App. 82, 624 N.W.2d 653 (2001). See, *In re Guardianship of Zyla*, 251 Neb. 163, 555 N.W.2d 768 (1996); *In re Conservatorship of Estate of Martin*, 228 Neb. 103, 421 N.W.2d 463 (1988). When reviewing an order for errors appearing on the record, the inquiry is whether the decision conforms to the law, is supported by competent evidence, and is neither arbitrary, capricious, nor unreasonable. *Law Offices of Ronald J. Palagi v. Dolan*, 251 Neb. 457, 558 N.W.2d 303 (1997).

ANALYSIS

[3-5] There is no dispute that for a good number of years prior to her death, Reimers received assistance from DHHS. Under the Medical Assistance Act, Neb. Rev. Stat. § 68-901 et seq. (Cum. Supp. 2006 & Supp. 2007), commonly known as Medicaid, a recipient generally becomes indebted to DHHS for assistance payments. See § 68-919(1). While the debt arising under such statute accrues during the recipient's lifetime, it is held in abeyance for payment until the recipient's death. See § 68-919(2). The personal representative of the estate of Reimers (Estate) does not dispute the assertion that DHHS is entitled to reimbursement under the circumstances set forth in the statute. However, the Estate refers us to § 68-919(2), which provides that the debt is recoverable only when the recipient is not survived by a "child who either is under twenty-one years of age or is blind or totally and permanently disabled as defined by the Supplemental Security Income criteria." The Estate argues that DHHS failed to prove that there was no surviving child as described in the statute, which is a precondition to reimbursement. We note that in DHHS' "Petition for Allowance of Claim," it was alleged that Reimers did not have such a surviving child. From the denial of the claim, we see that the Estate did not allege that this statutory provision prevented reimbursement. Accordingly, to the extent that this portion of § 68-919(2) creates a defense to DHHS' claim for reimbursement, the Estate failed to put such in issue before the trial court. It is well known that an issue not presented to or passed upon by the trial court is not an appropriate issue for consideration on appeal. See *Haeffner v. State*, 220 Neb. 560, 371 N.W.2d 658 (1985). This issue was not raised in the Estate's pleading, and the limited bill of exceptions does not reveal that it was raised before the county court. Accordingly, we need address it no further.

We now turn to the matter of exhibit 2. The Estate concedes that "the payment record [exhibit 2] was properly admitted." Brief for appellee at 2. Nonetheless, it is important to set forth the statute under which the exhibit was admitted, although given the Estate's concession, the core question for

us ultimately becomes, What does exhibit 2 prove? Section 68-919(4) provides:

> In any probate proceedings in which [DHHS] has filed a claim under this section, no additional evidence of foundation shall be required for the admission of [DHHS'] payment record supporting its claim if the payment record bears the seal of [DHHS], is certified as a true copy, and bears the signature of an authorized representative of [DHHS].

DHHS argues that exhibit 2 by itself proves its entitlement to reimbursement because "the exhibit itemized the dates the medical assistance was provided, the medical provider's name, the type of medical assistance provided whether it be the name of the prescription or the medical service performed, and the amount of the benefits which were allowed on . . . Reimers' behalf." Brief for appellant at 3.

Section 68-911, entitled "Medical assistance; mandated and optional coverage," lists 13 specified types of assistance which "shall" be covered and 19 which "may" be covered under the Medical Assistance Act. The Estate argues that DHHS' payment record, "in and of itself, is insufficient to satisfy [DHHS'] burden with respect to the claim" and that "[w]ithout further evidence, the exhibit does not establish that the individual entries refer to medical assistance or for that matter, which listed amounts, if any, were actually paid by [DHHS]." Brief for appellee at 3. The Estate also asserts that "[w]ithout additional evidence, the finder of fact is forced to guess as to the meaning of [the] numbers and references." *Id.* After our review of exhibit 2, the only evidence adduced, we conclude that each party is partially correct.

With respect to the contents of exhibit 2, DHHS breaks its claim down into three categories, as follows:

Total of Client Expense Report (07/17/1994 to 12/31/1998):	$ 7,941.17
Total of Client Detail Report (01/01/1999 to 03/31/2005):	$53,616.99
Total of Waiver Services (07/17/1994 to 03/31/2005:	$17,605.32
Total Nebraska Medicaid Payment:	$79,163.48

These categories by themselves do not tell the full story. However, to properly decide this matter, one simply has to examine the contents of the 122 pages of exhibit 2—which we have done. To the extent that DHHS believes that because § 68-919(4) allows it to dispense with foundation for its listing of Medicaid payments, then its reimbursement claim is proved simply by the admission in evidence of exhibit 2, we reject that notion. All § 68-919(4) does is get exhibit 2 in evidence, as the trial judge ruled, and the Estate concedes in its brief that the admission of exhibit 2 was proper. What then becomes determinative is what is proved by the contents of the exhibit, considered in the context of the Act.

The first 88 pages of exhibit 2 (after the certification page) contain detailed listings of drugs, both prescribed and over the counter, as well as a variety of medical services received by Reimers for the period beginning July 17, 1994, and continuing through November 10, 1998. The format of these pages is uniform and for each "claim," typically a prescription, medication, or a doctor visit, there is listed horizontally across the page the following information for each claim: "Total Claim Charges," the "Third Party Amount," the "Amount Disallowed," the "Amount Reduced," the "Reimburse Amount," the "Net Claim Charges," and the "Allowed Amount." It is, of course, the "reimburse amount" category which is crucial under the act, because it is these amounts for which DHHS seeks reimbursement. Having examined each claim detailed on the first 88 pages of exhibit 2, we find that all indisputably fall within the categories delineated by § 68-911 for which the Estate owes DHHS reimbursement and that no further evidence by way of explanation of such claims is needed. The Estate introduced no evidence to show that such claims were not reimbursable. Therefore, the county court was clearly wrong and committed error on the record in disallowing reimbursement of the claims shown on the first 88 pages of exhibit 2. The total that DHHS is entitled to from this portion of the exhibit is $7,941.17.

We now turn to the next 28 pages of exhibit 2, encompassing drugs and medical services from January 1, 1999, to March 22, 2005, the date of Reimers' death. It is apparent that DHHS changed the format of its recordkeeping beginning with

January 1, 1999. The format is that those pages are each entitled "Client Medicaid Expense Report," each has the name "Myrtle Reimers" at the top, and each then lists horizontally across each page the "Claim ID," the date, the "Provider ID and Name," the "Procedure Code/Product Name," the "Diagnosis Code," and the "Net Pay." The "net pay" column on these 28 pages totals $53,616.99. We do not set forth the details listed for each "Claim ID," of which there are 1,114 by our count, but again we have reviewed each page and the claim detailed thereupon. For example, the claims and payments range from a payment of $35.91 for "Adult Size Brief" with a "Diagnosis Code" of "Urinary Incontinence NOS" for Claim ID 711544721, to a variety of medical services and drugs for such things as a dislocated hip, hip joint replacement, and cataracts. Again there is no evidence to dispute that all of the claims set forth on those 28 pages of exhibit 2 are not properly reimbursable under the act, and facially, the exhibit shows that such are reimbursable. Therefore, the county court was clearly wrong and committed error on the record in finding that the evidence was insufficient to order reimbursement in the amount sought, specifically $53,616.99.

[6,7] The third category for which DHHS seeks reimbursement, in the amount of $17,605.32, is entitled "Total of Waiver Services," and such comprises the last six pages of exhibit 2. There are five types of subtotaled expenses. The first is "Chore"—with no further definition—and the amount sought is $13,262.82. The next is simply designated as "Emergency Refs," and the amount sought is $425. The third is simply "Escort" for $1,750.25. The fourth is "Escort Medic" for $350.25. The fifth is described only as "Respite in Hm" for $1,778. Inferentially, the five types listed on exhibit 2 and quoted above could possibly fall under one or more of the mandatory or optional medical services categories for which DHHS will pay under Medicaid, however to get to that conclusion, we would have to speculate or guess at the meaning of these cryptic terms. Moreover, the proof problems for such claims go deeper. Those six pages list only two columns of data: "Claim ID," followed by an amount. In sharp contrast to the other pages of exhibit 2 which we have discussed above, there are no names of providers, dates of

service, or information whether Reimers was institutionalized at the time of service (facts which can determine whether a payment is reimbursable under the act), reasons for service, or associated diagnoses. Accordingly, as opposed to the claims for reimbursement upon which we have reversed the county court's decision, all of the claims on the last six pages of exhibit 2 need, as the county court found, further evidence to establish that the amounts listed are in fact reimbursable by the Estate under § 68-919. In summary, the statute providing for admission of DHHS' payment record, § 68-919(4), clearly dispenses with foundation for the admission of the record if properly certified, as exhibit 2 was. However, the statute does not create any presumption that the amounts shown on the payment record are reimbursable by the recipient's estate—such must still be proved, and if the exhibit does not do so, then additional evidence is needed. Given that DHHS did not supplement exhibit 2 by other testimony or evidence, we cannot determine from the face of the payment record that the items set forth on the last six pages of exhibit 2 (in the category of "Waiver Services") are reimbursable under § 68-919. In short, with respect to those claims, DHHS did not carry its burden of proof.

CONCLUSION

For the reasons set forth above, we reverse the decision of the county court for Hall County and find that the Estate is obligated to reimburse DHHS in the amount of $61,558.16. We affirm that portion of the decision of the Hall County Court which found that the Estate was not obligated to reimburse DHHS in the amount of $17,605.32 for that portion of its claim entitled "Waiver Services." We remand the cause to the county court for Hall County for entry of judgment in accordance with our opinion.

AFFIRMED IN PART, AND IN PART REVERSED AND REMANDED.

ALICE TOLBERT AND CHAZ TOLBERT, PERSONAL REPRESENTATIVES OF THE ESTATES OF VICTORIA LYNN TOLBERT BURGESS AND TISHA CASSANDRA TOLBERT, ET AL., APPELLANTS, V. OMAHA HOUSING AUTHORITY, A POLITICAL SUBDIVISION, ET AL., APPELLEES.

747 N.W.2d 452

Filed April 1, 2008. No. A-06-1065.

1. **Motions to Dismiss: Rules of the Supreme Court: Pleadings: Appeal and Error.** A district court's grant of a motion to dismiss for failure to state a claim under Neb. Ct. R. of Pldg. in Civ. Actions 12(b)(6) (rev. 2003) is reviewed de novo, accepting all the allegations in the complaint as true and drawing all reasonable inferences in favor of the nonmoving party.
2. **Pleadings: Appeal and Error.** Whether a complaint states a cause of action is a question of law, to be reviewed on appeal de novo.
3. **Pleadings: Proof: Dismissal and Nonsuit.** A motion seeking dismissal of a complaint for failure to state a cause of action should be granted only if it appears beyond doubt that the plaintiff can prove no set of facts which would entitle him or her to relief.
4. **Federal Acts: Public Health and Welfare: Public Assistance.** The Department of Housing and Urban Development "Section 8" subsidy program is established under federal law, and its purpose is to help low-income families obtain decent, safe, and sanitary housing by subsidizing rent payments. The program is administered by a state or local government agency such as a housing authority, and the federal government provides funding to the local agency to provide the subsidy payments.
5. **Federal Acts: Public Health and Welfare: Public Assistance: Real Estate.** The Department of Housing and Urban Development "Section 8" subsidy program allows a housing authority to contract with private landowners to make rental properties available for eligible tenants. Landowners are required to meet certain housing quality standards for safe and habitable housing, and a housing authority is required to inspect any property offered for rental under the Section 8 program to determine whether it meets the housing quality standards.
6. **Federal Acts: Public Health and Welfare: Public Assistance.** Federal regulations set forth the housing quality standards required by the Department of Housing and Urban Development "Section 8" subsidy program, which standards consist of certain performance and acceptability requirements for key aspects of housing quality.
7. **Federal Acts: Public Health and Welfare.** Federal law preempts state law and bars a private right of action against a public housing authority.
8. **Federal Acts: Public Health and Welfare: Public Assistance.** Under Nebraska law, a Department of Housing and Urban Development "Section 8" subsidy program tenant may not bring an action against a public housing authority for failure to inspect rental properties and enforce the housing quality standards.

Appeal from the District Court for Douglas County: W. Russell Bowie III, Judge. Affirmed.

Sheri E. Cotton for appellants.

Thomas A. Grennan and Francie C. Riedmann, of Gross & Welch, P.C., L.L.O., for appellee Omaha Housing Authority.

Sievers, Carlson, and Moore, Judges.

Carlson, Judge.

INTRODUCTION

Alice Tolbert and Chaz Tolbert, individually and as personal representatives of the estates of Victoria Lynn Tolbert Burgess and Tisha Cassandra Tolbert, and John Tolbert, as guardian ad litem on behalf of Rictavianna Tolbert, a minor child (collectively referred to as "the plaintiffs"), appeal from an order of the district court for Douglas County granting a motion to dismiss the plaintiffs' amended complaint for failure to state a cause of action filed by the Omaha Housing Authority (OHA). On appeal, the plaintiffs allege that the trial court erred in determining that a federal statute controls a state's power to protect the health, safety, and welfare of its citizens, in finding that the sole cause of the injury to the plaintiffs was an unforeseeable criminal act, and in dismissing the plaintiffs' complaint. For the reasons set forth below, we affirm.

BACKGROUND

On January 23, 2006, the plaintiffs filed their amended complaint against OHA and "Mr. Jamison and Mrs. Jamison," doing business as Jamison Realty. The plaintiffs alleged that on April 5, 2003, Victoria Lynn Tolbert Burgess and Tisha Cassandra Tolbert (Tolbert) resided in a large two-story, single-family dwelling in Douglas County as tenants pursuant to a federal housing subsidy program commonly known as Section 8. The plaintiffs alleged that OHA is the administrator of Section 8 housing and that the Section 8 program requires property owners who participate in the Section 8 program to provide safe housing. The plaintiffs also alleged that Section 8 prohibits

OHA from contracting with a property owner if the property sought to be leased by the owner is unsanitary or unsafe.

The plaintiffs stated that at the time of a fire in the dwelling where Tolbert and Burgess lived, the first floor had a door at the back of the property, the front of the property had a closed-in porch, and the front door had been removed. Previously, there had also been a door on the second floor, leading to outside stairs from one of the bedrooms. However, that door had been boarded shut and the stairs had been removed. The plaintiffs also alleged that both Tolbert and Burgess were disabled.

The plaintiffs alleged that on April 5, 2003, an arsonist started the aforementioned fire and the fire blocked the only door leading out of the dwelling. Tolbert and Burgess "perished as a result of the fire, Burgess near the walled up door at the front of the dwelling and [Tolbert] near the boarded-up door in the second floor bedroom." The plaintiffs made several allegations against Jamison Realty, but because this appeal does not directly involve Jamison Realty, we will not repeat those allegations here.

The plaintiffs alleged that the act of OHA in permitting the use of the property as rental property under Section 8 and further continuing to permit the property to be used as rental property under Section 8 was a willful, reckless disregard of the safety of Tolbert and Burgess; members of the public who were their guests, invitees, or licensees; and any other person who may enter the premises, for the following reasons:

> a. [OHA] was charged with the duty of inspecting the property and insuring it was safe and sanitary[.]
>
> b. [OHA] was charged with the duty of insuring that in the event of a fire, the tenants had adequate emergency exits[.]
>
> c. [OHA] knew that the parties living in the home were disabled persons.
>
> d. [OHA] knew that at one time the property had a front and back entrance and another entrance on the second floor of the property, for a total of three entryways.
>
> e. [OHA] knew on the date of the last annual inspection the property had only one usable entryway and that entryway was located on the rear of the property.

> f. [OHA] knew that if a fire blocked the stairs, or the pathway to the only door, the persons in the front of the house and on the second floor would not be able to escape the fire.
>
> g. [OHA] had the power and authority to either require the landlord to make the property safe or to move [Tolbert and Burgess] to a residence that was safe and sanitary.
>
> h. With reckless indifference to the consequences of the inadequate fire exits[,] and with consciousness that the failure to have [adequate exits] would probably cause serious injury or death, [OHA] took no action to insure [Tolbert's and Burgess'] fire safety.

The plaintiffs also alleged that they had complied with Nebraska's Political Subdivisions Tort Claims Act. The plaintiffs brought three causes of action against OHA and Jamison Realty, the first for wrongful death, the second for predeath injuries and damages, and the third for funeral and medical expenses.

On February 1, 2006, OHA filed a motion to dismiss the plaintiffs' action pursuant to Neb. Ct. R. of Pldg. in Civ. Actions 12(b)(6) (rev. 2003), stating that the plaintiffs' amended complaint fails to state a claim upon which relief may be granted. OHA also moved to dismiss the plaintiffs' complaint pursuant to rule 12(b)(7) for failure to join a necessary party, more specifically the party who started the fire.

A hearing on OHA's motion was held on March 9, 2006. On April 20, the trial court granted OHA's motion to dismiss under rule 12(b)(6). Specifically, the court found that even if it construed all of the allegations in the plaintiffs' complaint in their favor and assumed that OHA was negligent, federal law "clearly states that the [plaintiffs] have no private right to bring an action against OHA to recover damages." The trial court also concluded as a matter of law that the arsonist's criminal act was an efficient intervening cause precluding the court from determining whether any alleged negligence by OHA proximately caused Tolbert's and Burgess' deaths. The trial court did not address whether the plaintiffs failed to join a necessary party. The trial court dismissed the plaintiffs' claims against OHA with prejudice. The plaintiffs appeal.

ASSIGNMENTS OF ERROR

On appeal, the plaintiffs assign that the trial court erred (1) in determining that a federal statute controls a state's power to protect the health, safety, and welfare of its citizens and (2) in finding that the sole cause of the injury to the plaintiffs was an unforeseeable criminal act and in dismissing the plaintiffs' complaint.

STANDARD OF REVIEW

[1-3] A district court's grant of a motion to dismiss for failure to state a claim under rule 12(b)(6) is reviewed de novo, accepting all the allegations in the complaint as true and drawing all reasonable inferences in favor of the nonmoving party. See *Washington v. Conley*, 273 Neb. 908, 734 N.W.2d 306 (2007). Whether a complaint states a cause of action is a question of law, to be reviewed on appeal de novo. *Dennes v. Dunning*, 14 Neb. App. 934, 719 N.W.2d 737 (2006). A motion seeking dismissal of a complaint for failure to state a cause of action should be granted only if it appears beyond doubt that the plaintiff can prove no set of facts which would entitle him or her to relief. *Id*.

ANALYSIS

On appeal, the plaintiffs argue that the trial court erred in determining that a federal statute controls a state's power to protect the health, safety, and welfare of its citizens.

Neb. Rev. Stat. § 13-910(3) (Cum. Supp. 2006) states that the Political Subdivisions Tort Claims Act shall not apply to

> [a]ny claim based upon the failure to make an inspection or making an inadequate or negligent inspection of any property other than property owned by or leased to such political subdivision to determine whether the property complies with or violates any statute, ordinance, rule, or regulation or contains a hazard to public health or safety unless the political subdivision had reasonable notice of such hazard or the failure to inspect or inadequate or negligent inspection constitutes a reckless disregard for public health or safety.

The plaintiffs contend that their amended complaint set out facts sufficient to show that OHA's actions in the instant case

constituted a reckless disregard for public health or safety under § 13-910(3) and that therefore, they are not barred from bringing a claim against OHA under state law. OHA argues, and the trial court agreed, that federal, not state, law applies because the plaintiffs alleged that OHA had a legal duty to protect Tolbert and Burgess under the federal statutes and regulations governing Section 8 rental properties.

[4] As the trial court stated, the Department of Housing and Urban Development (HUD) Section 8 subsidy program is established under federal law and its purpose is to help low-income families obtain "decent, safe and sanitary housing" by subsidizing rent payments. 24 C.F.R. § 982.1(a)(1) (2007). The program is administered by a state or local government agency such as OHA, and the federal government provides funding to the local agencies to provide the subsidy payments. See, generally, *id.*

[5,6] The HUD Section 8 subsidy program allows a housing authority to contract with private landowners to make rental properties available for eligible tenants. Landowners are required to meet certain housing quality standards for "safe and habitable housing," and a housing authority is required to inspect any property offered for rental under the Section 8 program to determine whether it meets the housing quality standards. See 42 U.S.C. § 1437f(o)(8)(A) and (B) (Supp. V 2005). Federal regulations set forth the housing quality standards, which standards consist of certain performance and acceptability requirements for key aspects of housing quality. See 24 C.F.R. § 982.401(a)(2) (2007).

The regulations specifically state that they do not

> create any right of the family, or any party other [than] HUD or the [public housing authority], to require enforcement of the [housing quality standards] requirements by HUD or the [public housing authority], or to assert any claim against HUD or the [pubic housing authority], for damages, injunction or other relief, for alleged failure to enforce the [housing quality standards].

See 24 C.F.R. § 982.406 (2007).

[7] Nebraska has yet to decide whether a Section 8 tenant may bring an action against a public housing authority for

failure to inspect rental properties and enforce the housing quality standards. Other jurisdictions have held that even if state law provides for suit against a public housing authority under these facts, federal law preempts state law and bars a private right of action against a public housing authority.

For example, in *Housing Auth. of City of South Bend v. Grady*, 815 N.E.2d 151 (Ind. App. 2004), the roommate of a tenant who received Section 8 tenant-based assistance from a city housing authority brought an action against the owner of the residence and the housing authority, the action arising out of an incident in which the roommate fell through the upstairs floor of the residence and sustained injuries. The housing authority filed a motion for summary judgment, and the trial court overruled the motion.

The housing authority appealed, and the Indiana Court of Appeals held that the Indiana statute providing that the housing authority could sue and be sued was preempted by a federal regulation providing that the regulatory scheme governing Section 8 housing does not give rise to a private right of action against a public housing authority. In doing so, the court stated:

> Congress obviously carved out this specific area to be governed by the federal regulation rather than state or local law. This is evidenced by the fact that 24 C.F.R. § 982.406 was enacted without comment and by the clear, unambiguous language used to draft the regulation. *See* Dept. of Housing and Urban Development, 60 Fed.Reg. 34,660, 34,680 (1995). Thus, the history of the enactment of § 982.406, as well as the text of the regulation, evince the clear intent of Congress to preempt state and local law with regard to the enforcement of the [housing quality standards].

Grady, 815 N.E.2d at 157.

The Indiana Court of Appeals then turned to the basis of the roommate's claims against the housing authority, which consisted of improper inspection of the residence, failure to identify structural issues and ensure their correction, failure to enforce its own policies regarding Section 8 housing, and failure to warn of structural defects. After reviewing the roommate's claims, the court concluded that each of the roommate's

claims related to the roommate's attempt to enforce the housing quality standards of the Section 8 housing assistance program. Therefore, the court held that all of the roommate's claims were preempted by federal law pursuant to § 982.406. See, also, *Kent v. Epherson*, 864 So. 2d 708 (La. App. 2003) (affirming trial court's dismissal of plaintiffs' cause of action against housing authority for failure to state cause of action and holding that plaintiffs could not recover against housing authority following act of arson at apartment complex that took lives of four individuals, because no private action existed against housing authority for alleged failure to comply with requirements of Section 8 housing quality standards); *Rivera v. Village of Spring Valley*, 284 A.D.2d 521, 727 N.Y.S.2d 458 (2001) (holding that plaintiffs could not recover damages against housing authority for injuries resulting from lead poisoning because statutory and regulatory scheme governing Section 8 housing does not give rise to private cause of action against public housing authority).

In the instant case, the trial court sustained OHA's motion to dismiss the plaintiffs' complaint under rule 12(b)(6) after concluding that the plaintiffs' amended complaint "essentially seeks relief from OHA, the public housing authority, for its failure to enforce the Housing Quality Standards." The court explained, "This type of action is specifically barred by federal regulation. See 24 C.F.R. § 982.406."

In their amended complaint, the plaintiffs allege that the act of OHA in permitting the use of the property as rental property under Section 8 and further continuing to permit the property to be used as rental property under Section 8 was a willful reckless disregard of the safety of Tolbert and Burgess and members of the public because OHA failed to inspect the property; failed to ensure that the tenants had adequate emergency exits, especially those tenants with disabilities; failed to require the landlord to make the property safe or to move Tolbert and Burgess to a residence that was safe and sanitary; and failed to take action to ensure Tolbert's and Burgess' safety in the event of a fire.

[8] After reviewing these allegations de novo, we conclude that all of these allegations are based on OHA's failure to

comply with the housing quality standards regulations under § 982.406. Therefore, even if we accept all of the plaintiffs' allegations in their complaint as true and draw all reasonable inferences in favor of the plaintiffs, federal law clearly states that the plaintiffs have no private right to bring an action against OHA to recover damages. We hold that the federal law regarding Section 8 housing was clearly meant to be overriding and that therefore, federal law preempts any Nebraska law on the matter. Therefore, under Nebraska law, a Section 8 tenant may not bring an action against a public housing authority for failure to inspect rental properties and enforce the housing quality standards.

In summary, it appears beyond a doubt that the plaintiffs cannot prove any set of facts which would entitle them to relief. See *Dennes v. Dunning*, 14 Neb. App. 934, 719 N.W.2d 737 (2006). Therefore, the trial court did not err in granting OHA's rule 12(b)(6) motion to dismiss for failure to state a cause of action.

CONCLUSION

After reviewing the record, we conclude that the trial court did not err in determining that the federal rules governing Section 8 housing bar a private cause of action against a public housing authority. Because of our holding, we find it unnecessary to determine whether the sole cause of the injury to the plaintiffs was an unforeseeable criminal act. The trial court's order dismissing the plaintiffs' amended complaint with prejudice is affirmed.

AFFIRMED.

MARTA MCNAMEE, APPELLANT, V. MARRIOTT RESERVATION CENTER, APPELLEE.

747 N.W.2d 30

Filed April 1, 2008. No. A-07-994.

1. **Workers' Compensation: Appeal and Error.** Pursuant to Neb. Rev. Stat. § 48-185 (Reissue 2004), an appellate court may modify, reverse, or set aside a Workers' Compensation Court decision only when (1) the compensation court

acted without or in excess of its powers; (2) the judgment, order, or award was procured by fraud; (3) there is not sufficient competent evidence in the record to warrant the making of the order, judgment, or award; or (4) the findings of fact by the compensation court do not support the order or award.

2. ____: ____. In determining whether to affirm, modify, reverse, or set aside a judgment of the Workers' Compensation Court review panel, a higher appellate court reviews the findings of the trial judge who conducted the original hearing.
3. **Courts: Evidence: Appeal and Error.** In an appellate review of a matter appealed from a county court to a district court, a higher appellate court can consider only such evidence as was presented to the district court in its intermediate review of the county court judgment.
4. **Records: Pleadings: Appeal and Error.** Absent a complete bill of exceptions, the only issue before the court on appeal is whether the pleadings are sufficient to support the judgment.

Appeal from the Workers' Compensation Court. Affirmed.

Marta McNamee, pro se.

Jerald L. Rauterkus, of Erickson & Sederstrom, P.C., for appellee.

SIEVERS, CARLSON, and MOORE, Judges.

CARLSON, Judge.

INTRODUCTION

Marta McNamee appeals from an order of the review panel of the Nebraska Workers' Compensation Court, affirming the trial court's dismissal of McNamee's petition with prejudice. For the reasons set forth below, we affirm. Pursuant to this court's authority under Neb. Ct. R. of Prac. 11B(1) (rev. 2006), this case was ordered submitted without oral argument.

BACKGROUND

In March 2006, McNamee filed a petition seeking benefits for injuries she sustained on January 2, 2003, while working for Marriott Reservation Center. Trial on McNamee's petition was held on October 12, 2006.

In an order filed December 26, 2006, the trial court dismissed McNamee's petition with prejudice, stating that it did not believe that McNamee had suffered any temporary or permanent impairment or disability that would entitle her

to payment of benefits under Nebraska law. McNamee then appealed to the review panel.

In an order filed August 13, 2007, the review panel affirmed the trial court's dismissal. The review panel stated that McNamee had failed to request the preparation of the bill of exceptions in accordance with Workers' Comp. Ct. R. of Proc. 13 and 14 (2006). The review panel found that in the absence of a bill of exceptions, it was limited to reviewing the pleadings to determine whether they supported the judgment entered. The review panel stated that it had reviewed the pleadings and found them sufficient to support the judgment entered. Therefore, the review panel affirmed the judgment of the trial court dismissing McNamee's petition. McNamee appeals.

ASSIGNMENT OF ERROR

On appeal, McNamee contends that the review panel erred in affirming the trial court's order dismissing her petition with prejudice.

STANDARD OF REVIEW

[1,2] Pursuant to Neb. Rev. Stat. § 48-185 (Reissue 2004), an appellate court may modify, reverse, or set aside a Workers' Compensation Court decision only when (1) the compensation court acted without or in excess of its powers; (2) the judgment, order, or award was procured by fraud; (3) there is not sufficient competent evidence in the record to warrant the making of the order, judgment, or award; or (4) the findings of fact by the compensation court do not support the order or award. *Olivotto v. DeMarco Bros. Co.*, 273 Neb. 672, 732 N.W.2d 354 (2007). In determining whether to affirm, modify, reverse, or set aside a judgment of the Workers' Compensation Court review panel, a higher appellate court reviews the findings of the trial judge who conducted the original hearing. *Id.*

ANALYSIS

On appeal, McNamee contends that the review panel erred in affirming the trial court's order dismissing her petition with prejudice. As noted above, the review panel found that it could not review the bill of exceptions in deciding McNamee's appeal, because McNamee failed to request that the bill of exceptions

be prepared. Rules 13 and 14 of the rules of procedure of the Workers' Compensation Court require that an appellant file a request for preparation of the bill of exceptions at the time of the filing of the appeal.

As a result of McNamee's failure to request the bill of exceptions, the review panel reviewed the pleadings to determine whether they supported the judgment, and because they did, the review panel affirmed the trial court's dismissal. McNamee has appealed to this court, and in her appeal, McNamee requested that the bill of exceptions be prepared. The bill of exceptions has been filed with this court. The question is whether we can review the bill of exceptions in this appeal given that the review panel did not have the bill of exceptions before it.

[3] Our review of Nebraska law shows that this issue has not been addressed in a workers' compensation case. We have held that in an appellate review of a matter appealed from a county court to a district court, this court can consider only such evidence as was presented to the district court in its intermediate review of the county court judgment. *State v. Trampe*, 12 Neb. App. 139, 668 N.W.2d 281 (2003), citing *State v. Cardona*, 10 Neb. App. 815, 639 N.W.2d 653 (2002).

We see no reason why this rule would not apply to the workers' compensation context in which an appellant must appeal from the trial court to the review panel and then to this court or the Nebraska Supreme Court. Otherwise, an appellant who had not complied with the rules governing preparation of the bill of exceptions in front of the review panel would be allowed, in effect, to bypass the review panel and go directly to this court for a full review. We do not consider this a proper result, and for this reason, we conclude that we cannot consider the bill of exceptions in our review of McNamee's appeal.

[4] As the review panel stated, absent a complete bill of exceptions, the only issue before the court on appeal is whether the pleadings are sufficient to support the judgment. *Norwest Bank Neb. v. Bellevue Bridge Comm.*, 7 Neb. App. 750, 585 N.W.2d 505 (1998). Having reviewed the pleadings, we determine that they are sufficient to support the judgment, and therefore, we affirm the order of the review panel affirming the trial court's dismissal of McNamee's case with prejudice.

CONCLUSION

After reviewing the record, we conclude that the review panel did not err in affirming the trial court's dismissal. Therefore, we affirm the review panel's order in its entirety.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. STEVEN V. BURNS, APPELLANT.

747 N.W.2d 635

Filed February 12, 2008. No. A-07-762.

This opinion has been ordered permanently published by order of the Court of Appeals dated April 4, 2008.

1. **Statutes: Appeal and Error.** Statutory interpretation presents a question of law, for which an appellate court has an obligation to reach an independent conclusion irrespective of the determination made by the court below.
2. **Courts: Time: Appeal and Error.** Where no timely statement of errors is filed in an appeal from a county court to a district court, appellate review is limited to plain error.
3. **Criminal Law: Statutes.** It is a fundamental principle of statutory construction that penal statutes are to be strictly construed.
4. ____: ____. Although penal statutes are strictly construed, they are given a sensible construction in the context of the object sought to be accomplished, the evils and mischiefs sought to be remedied, and the purpose sought to be served.
5. **Statutes: Appeal and Error.** Statutory language is to be given its plain and ordinary meaning, and an appellate court will not resort to interpretation to ascertain the meaning of statutory words which are plain, direct, and unambiguous.
6. **Statutes.** If the language of a statute is clear, the words of such statute are the end of any judicial inquiry.
7. **Motor Vehicles.** Where a vehicle is equipped with two taillights, Neb. Rev. Stat. § 60-6,219(6) (Reissue 2004) requires both taillights to give substantially normal light output and to show red directly to the rear.

Appeal from the District Court for Sarpy County, WILLIAM B. ZASTERA, Judge, on appeal thereto from the County Court for Sarpy County, MAX KELCH, Judge. Judgment of District Court affirmed.

James E. Schaefer, of Gallup & Schaefer, for appellant.

Jon Bruning, Attorney General, and George R. Love for appellee.

INBODY, Chief Judge, and IRWIN and CASSEL, Judges.

CASSEL, Judge.

INTRODUCTION

Steven V. Burns appeals from a district court judgment affirming a county court conviction and judgment. He attacks the denial of his motion to suppress, asserting that because Neb. Rev. Stat. § 60-6,219 (Reissue 2004) authorizes a vehicle to be equipped with "one or more" taillights, a vehicle having two taillights, one of which is unilluminated, nonetheless "shows red directly to the rear" and is in compliance with § 60-6,219. The lower courts correctly rejected Burns' argument, and we affirm.

BACKGROUND

The State filed a complaint in county court charging Burns with one count of driving under the influence of alcohol, .15 or over, and one count of vehicle light violation. Burns filed a motion to suppress, which the county court heard on December 28, 2006. The only issue was whether the deputy sheriff had reasonable suspicion to stop the vehicle Burns was driving. The deputy observed a vehicle traveling westbound on Giles Road in Sarpy County, Nebraska, on September 20. He observed that the vehicle displayed only one red light on the rear of the vehicle. The vehicle was equipped with two taillights, on the left and right, but the left taillight was not working. The deputy performed a traffic stop and detected the odor of an alcoholic beverage on Burns' breath. The county court overruled the motion to suppress.

The State filed an amended complaint, dropping the ".15 or over" enhancement, and the matter was tried on stipulated evidence. The State dismissed the vehicle light violation, and the court found Burns guilty of driving under the influence. The county court sentenced Burns. He timely appealed to the district court, but filed no statement of errors. The district court for Sarpy County affirmed.

Burns timely appeals to this court. Pursuant to the authority granted to this court under Neb. Ct. R. of Prac. 11B(1) (rev. 2006), this case was ordered submitted without oral argument.

ASSIGNMENT OF ERROR

Burns' sole assignment of error claims that the district court erred in affirming the county court's order overruling Burns' motion to suppress.

STANDARD OF REVIEW

[1] Statutory interpretation presents a question of law, for which an appellate court has an obligation to reach an independent conclusion irrespective of the determination made by the court below. *State v. Griffin*, 270 Neb. 578, 705 N.W.2d 51 (2005).

[2] Where no timely statement of errors is filed in an appeal from a county court to a district court, appellate review is limited to plain error. *Id.*

ANALYSIS

Burns' argument relies upon § 60-6,219, which provides in pertinent part:

> (3) Every motor vehicle . . . shall be equipped with one or more taillights, at the rear of the motor vehicle . . . , exhibiting a red light visible from a distance of at least five hundred feet to the rear of such vehicle.
>
> . . . .
>
> (6) It shall be unlawful for any owner or operator of any motor vehicle to operate such vehicle upon a highway unless:
>
> (a) The condition of the lights and electric circuit is such as to give substantially normal light output;
>
> (b) Each taillight shows red directly to the rear, the lens covering each taillight is unbroken, each taillight is securely fastened, and the electric circuit is free from grounds or shorts.

[3,4] It is a fundamental principle of statutory construction that penal statutes are to be strictly construed. *State v. Gozzola*, 273 Neb. 309, 729 N.W.2d 87 (2007). Although penal statutes

are strictly construed, they are given a sensible construction in the context of the object sought to be accomplished, the evils and mischiefs sought to be remedied, and the purpose sought to be served. *State v. Aguilar*, 268 Neb. 411, 683 N.W.2d 349 (2004).

[5,6] Statutory language is to be given its plain and ordinary meaning, and an appellate court will not resort to interpretation to ascertain the meaning of statutory words which are plain, direct, and unambiguous. *State v. Wester*, 269 Neb. 295, 691 N.W.2d 536 (2005). If the language of a statute is clear, the words of such statute are the end of any judicial inquiry. *State v. Rhea*, 262 Neb. 886, 636 N.W.2d 364 (2001).

Burns argues that because § 60-6,219(3) allows a vehicle to be equipped with one taillight, a vehicle actually equipped with two taillights need only have one in operation. He argues that the provision of § 60-6,219(6)(b) requiring that "[e]ach taillight shows red directly to the rear" does not impose a requirement that both taillights be illuminated. We reject this strained interpretation.

Even viewed in isolation, the plain and unambiguous meaning of § 60-6,219(6)(b) that "[e]ach taillight shows red directly to the rear" clearly requires the light source to be illuminated. A taillight which is not operable cannot reasonably be understood to "show" red directly to the rear. Moreover, § 60-6,219(6)(a) requires "[t]he condition of the lights and electric circuit is such as to give substantially normal light output." In other words, the light must be illuminated in the normal fashion.

[7] While it is lawful to have a vehicle designed for only one taillight, Burns' vehicle was equipped with two taillights. Where a vehicle is equipped with two taillights, the language of § 60-6,219(6) requires both taillights to "give substantially normal light output" and to "[show] red directly to the rear." If one of the taillights is not illuminated, it fails to comply with both of these statutory requirements. It follows that Burns was committing a traffic violation, providing probable cause for the traffic stop. See *State v. Voichahoske*, 271 Neb. 64, 709 N.W.2d 659 (2006) (traffic violation, no matter how minor, creates probable cause to stop driver of vehicle).

CONCLUSION

The lower courts did not err in rejecting Burns' incorrect statutory interpretation. Therefore, we find no error, much less plain error, in the rulings of the courts below.

AFFIRMED.

TERRY L. WORLEY, APPELLANT, V. ROBERT P. HOUSTON, DIRECTOR OF THE DEPARTMENT OF CORRECTIONAL SERVICES, AND RONALD REITHMULLER, RECORDS ADMINISTRATOR, APPELLEES.

747 N.W.2d 639

Filed April 15, 2008. No. A-07-151.

1. **Prisoners: Sentences.** Pursuant to Neb. Rev. Stat. § 83-1,107(2) (Cum. Supp. 1996), the chief executive officer of a facility shall reduce the term of a committed offender by 3 months for each year of the offender's term and pro rata for any part thereof which is less than a year.
2. ____: ____. Pursuant to Neb. Rev. Stat. § 83-1,107(3) (Cum. Supp. 1996), the chief executive officer shall reduce the term of a committed offender up to an additional 3 months for each year of the offender's term and pro rata for any part thereof which is less than a year upon participation in or completion of a personal program.
3. ____: ____. Pursuant to Neb. Rev. Stat. § 83-1,107 (Cum. Supp. 1996), the total of all the reductions of the term of a committed offender shall be credited from the date of sentence, which shall include any term of confinement prior to sentence and commitment as provided pursuant to Neb. Rev. Stat. § 83-1,106 (Reissue 1999), and shall be deducted from the maximum term, to determine the date when discharge from the custody of the state becomes mandatory.
4. **Summary Judgment.** Summary judgment is proper when the pleadings and evidence admitted at the hearing disclose that there is no genuine issue as to any material fact or as to the ultimate inferences that may be drawn from those facts and that the moving party is entitled to judgment as a matter of law.
5. **Summary Judgment: Appeal and Error.** In reviewing a summary judgment, an appellate court views the evidence in the light most favorable to the party against whom the judgment is granted and gives such party the benefit of all reasonable inferences deducible from the evidence.
6. **Statutes: Appeal and Error.** Statutory interpretation is a matter of law, in connection with which an appellate court has an obligation to reach an independent, correct conclusion irrespective of the determination made by the court below.
7. **Prisoners: Sentences.** Pursuant to Neb. Rev. Stat. § 83-1,107(2) (Cum. Supp. 1996), good time is credited at the time of a prisoner's sentence and is based on the prisoner's maximum term.

8. ____: ____. Neb. Rev. Stat. § 83-1,107(3) (Cum. Supp. 1996) requires that a prisoner be credited with good time for participation in a personal program at the beginning of his sentence, based on the maximum sentence at that time, at the rate of 3 months per year, and such is to be deducted from his maximum term in order to determine his mandatory discharge date in addition to the 3 months per year of his maximum term for good time under § 83-1,107(2).

Appeal from the District Court for Lancaster County: JEFFRE CHEUVRONT, Judge. Reversed.

Kate M. Jorgensen, of Stratton & Kube, P.C., and, on brief, Andrew D. Weeks for appellant.

Jon Bruning, Attorney General, and Linda L. Willard for appellees.

SIEVERS, MOORE, and CASSEL, Judges.

SIEVERS, Judge.

Terry L. Worley argued to the district court for Lancaster County that prison officials had miscalculated his sentence under Neb. Rev. Stat. § 83-1,107 (Cum. Supp. 1996). The district court rejected his claim, and he now appeals to this court.

FACTUAL AND PROCEDURAL BACKGROUND

[1-3] On November 4, 1997, Worley was sentenced in York County, Nebraska, to a term of imprisonment of 20 to 25 years, with credit for 159 days served. Worley was sentenced under a version of § 83-1,107 in which the Nebraska Legislature had amended a "good time" law via 1995 Neb. Laws, L.B. 371. Prior to L.B. 371, § 83-1,107 (Reissue 1994) provided that a person sentenced to prison automatically received 6 months of good time credited against his sentence for every year of his prison term and that good time was credited at the time of sentencing. L.B. 371 amended the statute so that it read, in part, as follows:

> (2) The chief executive officer of a facility shall reduce the term of a committed offender by three months for each year of the offender's term and pro rata for any part thereof which is less than a year.
>
> (3) The chief executive officer shall reduce the term of a committed offender up to an additional three months for

> each year of the offender's term and pro rata for any part thereof which is less than a year upon [*participation in or completion of a personal program.*]
>
> . . . .
>
> The total of all the reductions shall be credited from the date of sentence, which shall include any term of confinement prior to sentence and commitment as provided pursuant to section 83-1,106, and shall be deducted from the maximum term, to determine the date when discharge from the custody of the state becomes mandatory.

§ 83-1,107 (Cum. Supp. 1996) (emphasis supplied).

Robert P. Houston, director of the Department of Correctional Services, and Ronald Reithmuller, records administrator for the Department of Correctional Services (collectively Appellees), calculated Worley's prison term and informed Worley that his mandatory discharge date was based on a period of 15 years minus the credit for time served, which would make his release date May 24, 2012. This calculation assumed that good time under § 83-1,107(3) for participation in or completion of a personal program was to be credited year by year after successful completion of a personal program—as opposed to being credited at the beginning of the sentence based on the prisoner's maximum sentence in the same manner as good time under § 83-1,107—and then being added back to the sentence for any year in which the inmate did not complete a personal program. Worley filed a petition for declaratory judgment in the district court for Lancaster County against Appellees and the Department of Correctional Services, alleging that his mandatory discharge date had been miscalculated. The suit against the Department of Correctional Services was dismissed on grounds of sovereign immunity. On cross-motions for summary judgment, the district court, while noting that § 83-1,107 was ambiguous, entered an order in favor of Appellees. Worley timely appealed.

ASSIGNMENTS OF ERROR

Worley assigns error to the district court for sustaining Appellees' motion for summary judgment, overruling Worley's motion for summary judgment, and determining that Appellees had correctly calculated his mandatory discharge date.

STANDARD OF REVIEW

[4] Summary judgment is proper when the pleadings and evidence admitted at the hearing disclose that there is no genuine issue as to any material fact or as to the ultimate inferences that may be drawn from those facts and that the moving party is entitled to judgment as a matter of law. *Eicher v. Mid America Fin. Invest. Corp.*, 270 Neb. 370, 702 N.W.2d 792 (2005).

[5] In reviewing a summary judgment, an appellate court views the evidence in the light most favorable to the party against whom the judgment is granted and gives such party the benefit of all reasonable inferences deducible from the evidence. *Spear T Ranch v. Nebraska Dept. of Nat. Resources*, 270 Neb. 130, 699 N.W.2d 379 (2005).

[6] Statutory interpretation is a matter of law, in connection with which an appellate court has an obligation to reach an independent, correct conclusion irrespective of the determination made by the court below. See *In re Interest of S.B.*, 263 Neb. 175, 639 N.W.2d 78 (2002).

ANALYSIS

This is a case of first impression but also of limited impression because of later legislative amendments to the statutes dealing with an inmate's good time credit. Neither of the Nebraska appellate courts has addressed the question raised by this case, but since Worley was sentenced, the Nebraska Legislature has again amended § 83-1,107, so the version of the statute at issue in this case is no longer in effect.

[7] Neither party contests that the 3 months of good time per year of the inmate's sentence pursuant to § 83-1,107(2) is to be credited to a prisoner at the beginning of his sentence. However, the parties disagree as to how good time is credited under § 83-1,107(3). Worley asserts that good time under § 83-1,107(3) is to be credited at the beginning of a prisoner's sentence and is to be based on the prisoner's maximum term, as it is in § 83-1,107(2). But Appellees argue that good time is calculated based on the actual number of years a prisoner could complete in prison, a number which is smaller than his maximum term because of the good time that is credited to him under § 83-1,107(2). The practical difference in these

interpretations is that under Appellees' interpretation, a prisoner cannot accumulate as much good time as under Worley's interpretation and serves a longer sentence. In Worley's case, the difference is 30 months.

The language in § 83-1,107(2), in which good time is calculated based on a prisoner's maximum term, and the language in § 83-1,107(3) are nearly identical. This favors Worley's argument that his sentence was miscalculated, because it is logical that two provisions by which an inmate's sentence is shortened found within the same statute, given their nearly identical language, should not be applied or calculated differently. Both sections base the amount of good time to be credited to a prisoner on the prisoner's "term," and therefore, since it is uncontested that "term" in § 83-1,107(2) refers to the prisoner's maximum term, the word "term" in § 83-1,107(3) also refers to the prisoner's maximum term.

Further, the language from § 83-1,107 which causes good time under § 83-1,107(2) to be applied at the beginning of a prisoner's sentence, "[t]he total of *all the reductions* shall be credited from the date of sentence . . ." (emphasis supplied), does not distinguish in any way between the good time given under § 83-1,107(2) and that given under § 83-1,107(3). And of course, the use of the language "all the reductions" again, rather pointedly in our view, evidences a legislative intent that both types of good time be applied and credited from the outset of the sentence, as stated in the statute. And then, if any of the good time is not "earned" under § 83-1,107(3), those periods are added back to the inmate's sentence.

[8] Therefore, we interpret § 83-1,107(3) to require that a prisoner be credited with good time for participation in a personal program at the beginning of his sentence, based on the maximum sentence at that time, at the rate of 3 months per year, and such is to be deducted from his maximum term in order to determine his mandatory discharge date in addition to the 3 months per year of his maximum term for good time under § 83-1,107(2). Our conclusion is based on the plain reading of the words used is the statute, because, despite the disagreement of the parties about the meaning of the statute, we find that it is not ambiguous.

Accordingly, since Worley's maximum sentence is 25 years, by crediting him with 6 months of good time per year of such term, plus 159 days for time served, we find that Worley's mandatory discharge date is 12 years 6 months from the date on which he was sentenced, November 4, 1997. Adding 12 years 6 months to that date, and subtracting 159 days for time served, makes Worley's mandatory discharge date November 26, 2009. Of course, the mandatory discharge date so determined is only a tentative date, because a prisoner might fail to perform the requirements of the prisoner's personal program or be subject to losing good time for disciplinary reasons.

CONCLUSION

For the reasons stated above, we reverse the district court's order sustaining Appellees' motion for summary judgment and overruling Worley's motion for summary judgment. Worley's motion for summary judgment is hereby sustained, and his mandatory discharge date from prison is November 26, 2009.

REVERSED.

JAMES L. YELLI, APPELLANT, V. BEVERLY NETH, DIRECTOR, STATE OF NEBRASKA, DEPARTMENT OF MOTOR VEHICLES, APPELLEE.

747 N.W.2d 459

Filed April 15, 2008. No. A-07-567.

1. **Administrative Law: Motor Vehicles: Licenses and Permits: Revocation.** The holder of a commercial driver's license is subject to administrative revocation for driving a commercial vehicle with a blood alcohol content of .04 or more.
2. **Jurisdiction: Appeal and Error.** Before reaching the legal issues presented for review, it is the duty of an appellate court to determine whether it has jurisdiction over the matter before it.
3. ____: ____. A jurisdictional question which does not involve a factual dispute is determined by an appellate court as a matter of law.
4. **Administrative Law: Motor Vehicles: Licenses and Permits: Revocation: Appeal and Error.** Neb. Rev. Stat. § 60-4,167.02 (Reissue 2004) provides that any person aggrieved because of disqualification pursuant to a hearing under Neb. Rev. Stat. § 60-4,167 (Reissue 2004) may appeal to the district court of the county where the alleged violation occurred in accordance with the Administrative Procedure Act.

5. **Administrative Law: Final Orders: Time: Appeal and Error.** Under the Administrative Procedure Act, judicial review shall be instituted by filing a petition in the district court of the county where the action is taken within 30 days after the service of the final decision by the agency.
6. **Jurisdiction: Counties: Appeal and Error.** If the district court lacks appellate jurisdiction because an appeal is filed in the wrong county, such court lacks jurisdiction to transfer the case to the proper county.

Appeal from the District Court for Stanton County: ROBERT B. ENSZ, Judge. Appeal dismissed.

David W. Jorgensen, of Nye, Hervert, Jorgensen & Watson, P.C., for appellant.

Jon Bruning, Attorney General, and Milissa D. Johnson-Wiles for appellee.

SIEVERS, CARLSON, and MOORE, Judges.

SIEVERS, Judge.

This case involves the administrative license revocation of a commercial driver's license (CDL), a topic on which there is a paucity of discussion by the Nebraska appellate courts. We ultimately determine that this case is resolved by a jurisdictional defect. Pursuant to our authority under Neb. Ct. R. of Prac. 11B(1) (rev. 2006), we have ordered the cause submitted without oral argument.

PROCEDURAL AND FACTUAL BACKGROUND

On September 19, 2006, a Stanton County deputy sheriff made a traffic stop of James L. Yelli, who was then driving a 53-foot tractor-trailer. According to the deputy, the stop was made on U.S. Highway 275 on the Stanton County-Cuming County line. The deputy testified that he had seen the violation occur west of the east junction of Highway 275 and state Highway 15 on Highway 275 in Stanton County. On the other hand, Yelli testified that he was stopped at mile marker 97, and it is suggested that the encounter occurred in Cuming County. Yelli was ultimately arrested pursuant to Neb. Rev. Stat. § 60-6,197 (Reissue 2004) and submitted to testing which registered .113 of a gram of alcohol per 210 liters of breath.

The revocation hearing officer discussed the controversy of where Yelli was stopped and concluded that he accepted the officer's testimony and that the stop occurred at the Stanton County-Cuming County line for a violation occurring west of that location in Stanton County. Beverly Neth, director of the Department of Motor Vehicles (Director), adopted the hearing officer's findings in her revocation.

[1] This revocation is controlled by Neb. Rev. Stat. §§ 60-4,167 through 60-4,167.02 (Reissue 2004). That statutory scheme makes the holder of a CDL subject to administrative revocation for driving a commercial vehicle with a blood alcohol content of .04 or more. See Neb. Rev. Stat. § 60-4,164(5) (Reissue 2004). Therefore, the Director found that Yelli was disqualified from driving a commercial motor vehicle pursuant to Neb. Rev. Stat. §§ 60-4,163 through 60-4,172 (Reissue 2004 & Cum. Supp. 2006), which carries a disqualification of 1 year. The hearing occurred on November 29, 2006, in Stanton, Stanton County, Nebraska. The Director's decision was dated December 6, 2006.

On December 21, 2006, Yelli filed an appeal of the Director's decision in the district court for Holt County, Nebraska. We note that paragraph 5 of the appeal provides as follows: "Venue is appropriate in the District Court of Stanton County, Nebraska because [Yelli] resides in [sic] events leading to [Yelli's] arrest occurred in Stanton County, Nebraska." While the quoted sentence suffers from a lack of proofreading, we take it to be an allegation that the events leading to Yelli's arrest occurred in Stanton County, Nebraska. Despite this allegation, the appeal was filed in the district court for Holt County, Nebraska. The Director filed an answer alleging that the Holt County District Court lacked subject matter jurisdiction, asserting that the appeal needed to be filed in the county where the alleged violation occurred, which was not Holt County. Thereupon, Yelli filed a motion to transfer the matter from the district court for Holt County to the district court for Stanton County, which motion was granted on March 12, 2007. On May 15, the district court for Stanton County affirmed the order of the Director disqualifying Yelli from operating a commercial motor vehicle for 1 year. Yelli has perfected his appeal to this court.

JURISDICTIONAL ISSUE

[2] Before reaching the legal issues presented for review, it is the duty of an appellate court to determine whether it has jurisdiction over the matter before it. *Dillion v. Mabbutt*, 265 Neb. 814, 660 N.W.2d 477 (2003).

[3] Our standard of review is that a jurisdictional question which does not involve a factual dispute is determined by an appellate court as a matter of law. *Fischer v. Cvitak*, 264 Neb. 667, 652 N.W.2d 274 (2002).

While we have earlier alluded to the factual dispute between Yelli and the arresting deputy as to where the violation occurred and where the stop occurred, it is clear that the disputed location is either Stanton or Cuming County—both a long way from Holt County, where this appeal was filed. Therefore, the jurisdictional issue does not involve a factual dispute.

[4] This administrative license revocation proceeded under § 60-4,167, which references the CDL of a person who is the subject of the officer's sworn report. Section 60-4,167.02 provides that any person aggrieved because of disqualification pursuant to a hearing under § 60-4,167 "may appeal to the district court of the county where the alleged violation occurred in accordance with the Administrative Procedure Act." There is no dispute that the traffic violation and the arrest for driving while intoxicated did not occur in Holt County.

[5] Turning to the Administrative Procedure Act, Neb. Rev. Stat. § 84-917 (Cum. Supp. 2006) provides that a person aggrieved by a final decision in a contested case is entitled to judicial review. Section 84-917(2)(a) provides that such review "shall be instituted by filing a petition in the district court of the county where the action is taken within thirty days after the service of the final decision by the agency."

In *Essman v. Nebraska Law Enforcement Training Ctr.*, 252 Neb. 347, 350, 562 N.W.2d 355, 357 (1997), the court said that where a district court has statutory authority to review an action of an administrative agency, the district court may acquire jurisdiction only if the review is sought "'in the mode and manner and within the time provided by statute.'" Quoting *McCorison v. City of Lincoln*, 218 Neb. 827, 359 N.W.2d 775 (1984). The *Essman* decision also refers to the above-quoted portion of

§ 84-917(2)(a). *Essman* discusses the phrase "county where the action is taken" as used in § 84-917(2)(a) and reiterates that it is the site of the first adjudicated hearing of a disputed claim. Thus, there is no question that the appeal had to be filed in Stanton County District Court under the Administrative Procedure Act, because that is where the hearing resulting in the disqualification of Yelli's CDL occurred.

[6] Therefore, the filing in Holt County was a nullity, and that court never acquired jurisdiction. Therefore, the Holt County District Court lacked jurisdiction to transfer the appeal to the Stanton County District Court. See *Gilmore v. Nebraska Crime Vict. Rep. Bd.*, 225 Neb. 640, 407 N.W.2d 736 (1987) (if district court lacks appellate jurisdiction because appeal is filed in wrong county, such court lacks jurisdiction to transfer case to proper county). Yelli's appeal cannot be saved by a motion and order of transfer from the district court for Holt County, a court that never had jurisdiction, to the district court for Stanton County, because § 84-917(2)(a) imposes a 30-day time limit in which to file an Administrative Procedure Act appeal. See *Gilmore, supra.* Accordingly, the Stanton County District Court never acquired jurisdiction, and when the lower court from which the appeal to this court did not have jurisdiction, neither do we. See *Schmidt v. State*, 255 Neb. 551, 586 N.W.2d 148 (1998) (when lower court does not gain jurisdiction over case before it, appellate court also lacks jurisdiction to review merits of claim).

CONCLUSION

Because Yelli's attempt to obtain judicial review of his administrative license revocation was filed in Holt County District Court, which lacked jurisdiction, such filing was a nullity, as was its order transferring such appeal to the Stanton County District Court, the court having jurisdiction over any such appeal. Since the Stanton County District Court never acquired jurisdiction, this court lacks jurisdiction. Therefore, the appeal is dismissed.

APPEAL DISMISSED.

STATE OF NEBRASKA, APPELLEE, V.
JASON L. COLBY, APPELLANT.
748 N.W.2d 118

Filed April 22, 2008. No. A-07-777.

1. **Motions to Suppress: Investigative Stops: Warrantless Searches: Probable Cause: Appeal and Error.** A trial court's ruling on a motion to suppress based on the Fourth Amendment, apart from determinations of reasonable suspicion to conduct investigatory stops and probable cause to perform warrantless searches, is to be upheld on appeal unless its findings of fact are clearly erroneous. The ultimate determinations of reasonable suspicion to conduct an investigatory stop and probable cause to perform a warrantless search are reviewed de novo and findings of fact are reviewed for clear error, giving due weight to the inferences drawn from those facts by the trial judge.
2. **Search and Seizure: Search Warrants: Probable Cause.** Generally, a search should be undertaken only pursuant to a warrant supported by probable cause.
3. **Probation and Parole.** Probation, like incarceration, is a form of criminal sanction imposed by a court upon an offender after verdict, finding, or plea of guilty.
4. **Probation and Parole: Search and Seizure: Constitutional Law.** Conditions in probation orders requiring the probationer to submit to warrantless searches, to the extent that they contribute to the rehabilitation process and are done in a reasonable manner, are valid and constitutional.
5. **Search and Seizure.** The reasonableness of a search is determined by assessing, on the one hand, the degree to which it intrudes upon an individual's privacy and, on the other, the degree to which it is needed for the promotion of legitimate governmental interests.

Appeal from the District Court for Scotts Bluff County: RANDALL L. LIPPSTREU, Judge. Affirmed.

Brian J. Lockwood, Deputy Scotts Bluff County Public Defender, for appellant.

Jon Bruning, Attorney General, and Stacy M. Foust for appellee.

SIEVERS, MOORE, and CASSEL, Judges.

CASSEL, Judge.

INTRODUCTION

Jason L. Colby was the subject of a warrantless probation search which led to convictions of drug offenses. On appeal, he challenges the district court's order overruling his motion to suppress evidence discovered as a result of the probation search.

Because we conclude that the provision of the probation order authorizing warrantless searches contributes to the rehabilitation process and that the search was reasonable, we affirm.

BACKGROUND

On October 24, 2005, the district court for Scotts Bluff County sentenced Colby to probation for a period of 3 years for his conviction of possession of a controlled substance. Daniel J. Witko, chief probation officer, was assigned as Colby's supervising probation officer. The terms of Colby's probation required him to report as directed by the court or his probation officer; "submit to searches of [his] residence, vehicle, or person without a warrant and without probable cause when a probation officer has a reasonable suspicion that [he] ha[s] violated terms of [his] probation"; refrain from using or possessing alcohol or controlled substances; and submit to drug tests.

On January 10, 2007, Witko asked Kent Ewing, a detective with the Gering Police Department, to conduct a probation search of Colby and Colby's residence. Ewing agreed to perform the search. Witko determined that he would be out of town on the day Ewing would perform the search. Therefore, Ewing performed the search without Witko. Witko expressly instructed Ewing on how to conduct the search, ordering him to search Colby's residence for any contraband pertaining to illegal drugs, and gave Ewing the probation order.

Ewing decided, based upon information he had regarding Colby, that it would be best to make contact with Colby outside of his residence. Therefore, on the morning of January 17, 2007, he set up surveillance about a block and a half from Colby's residence. He then waited for Colby to leave his residence. Colby left his residence in a vehicle around 7:35 p.m., at which time Ewing requested the assistance of another officer. The other officer conducted a traffic stop of Colby's vehicle. Ewing arrived after the stop and provided Colby with the information from Witko, including the probation order. A probation search of Colby's person was performed. The search revealed, among other things, drug paraphernalia and a clear plastic bag containing what was later determined to be methamphetamine. Colby was placed under arrest and transported to

jail, where more bags containing methamphetamine were found in Colby's mouth.

After Colby's arrest, Ewing searched his vehicle and requested a search warrant for Colby's residence. Ewing submitted an affidavit in support of a search warrant to the district judge. He recited the events of the day, including the arrest and search of Colby. Ewing also stated that as recently as December 31, 2006, an officer had received an anonymous tip that Colby was selling methamphetamine out of his residence. Based upon Ewing's affidavit, a district judge issued a search warrant on January 17, 2007, for the search of Colby's residence. Officers executed the warrant on the same day and seized methamphetamine and drug paraphernalia.

Colby initially faced charges in the county court for Scotts Bluff County. The case was then bound over to district court. On February 1, 2007, Colby was charged by information in the district court with possession of a controlled substance with intent to deliver and possession of drug paraphernalia.

On February 27, 2007, Colby filed a motion to suppress evidence and statements. He requested an order suppressing any evidence and statements he made to police officers on January 17, together with any fruits of such evidence. He asserted that the warrantless search of his vehicle was made "without legal justification and was a violation of [his] right to be free of unreasonable searches and seizures."

The court held a hearing on the motion to suppress. Witko testified that he ordered the probation search of Colby because in the early part of January 2007, he received an anonymous telephone call informing him that Colby was using drugs and "beating his drug tests by using a fake rubber penis of that nature." Witko also had concerns regarding Colby prior to that telephone call. He testified that Colby "hadn't been in to report for quite a time." Witko testified that Colby was required to report to him in person once a month while on probation. According to Witko, Colby was compliant with his probation orders the first 30 days, reported the first 2 or 3 months, and "then we just lost track, he did not come in." Witko's last contact with Colby was on February 28, 2006, and Colby last submitted to a drug test on March 3. Witko testified

that Colby's actions "raise[d] a red flag . . . that either [he] absconded supervision or [he did] not want to report for some reason." Witko testified that he was not present when Colby or his residence was searched. He further testified that the terms of Colby's probation were based on statutes and standards for the State of Nebraska.

Ewing testified that he searched Colby's residence pursuant to the probation order and that he obtained the search warrant "to make sure of the application for the search." He testified that the only reason he pursued Colby to search Colby's person and residence was to comply with Witko's request.

At the conclusion of the hearing, the court stated that when Colby discontinued contact with his probation officer and discontinued drug testing, there was reasonable suspicion for his probation officer to direct a search of his person, residence, or vehicle. The court also determined that the probation officer did not need to be present for the search. With regard to the search of Colby's residence, the court stated, "[O]nce the search was done of . . . Colby and they found the narcotics on him, that was included in the affidavit and that was probabl[e] cause to get the search warrant." The court concluded that the searches were valid and overruled the motion to suppress.

A jury trial was held on the charge of possession of methamphetamine with intent to deliver or distribute. On June 13, 2007, the jury found Colby guilty of that charge. Colby was also found guilty by the court of possession of drug parahernalia and fined $100. On July 12, the court sentenced Colby to 5 to 8 years' imprisonment, with credit for 66 days served, for his conviction of possession of methamphetamine with intent to distribute or deliver, and also ordered him to pay court costs of $141.

Colby timely appeals.

ASSIGNMENT OF ERROR

Colby assigns that the district court erred in failing to suppress evidence obtained during an unlawful search and seizure.

STANDARD OF REVIEW

[1] A trial court's ruling on a motion to suppress based on the Fourth Amendment, apart from determinations of reasonable suspicion to conduct investigatory stops and probable cause to

perform warrantless searches, is to be upheld on appeal unless its findings of fact are clearly erroneous. The ultimate determinations of reasonable suspicion to conduct an investigatory stop and probable cause to perform a warrantless search are reviewed de novo and findings of fact are reviewed for clear error, giving due weight to the inferences drawn from those facts by the trial judge. *State v. Allen*, 269 Neb. 69, 690 N.W.2d 582 (2005), *disapproved on other grounds, State v. McCulloch*, 274 Neb. 636, 742 N.W.2d 727 (2007).

ANALYSIS

According to Colby, if the probation search had not been performed, the warrant for the search of his residence would not have been issued. Therefore, if the probation search was unlawful, the residence search was also unlawful. He asserts that the probation search was an unlawful warrantless search because the condition of his probation permitting warrantless searches did not contribute to the rehabilitation process and because the probation search was not performed in a reasonable manner. In support of his argument that the search was unreasonable, Colby emphasizes the fact that Witko was not present for the probation search, the remoteness in time of the search to any suspected wrongdoing by Colby, and the lack of wrongdoing by Colby at the time of the search.

[2,3] The Fourth Amendment to the U.S. Constitution protects against unreasonable searches and seizures. Generally, a search should be undertaken only pursuant to a warrant supported by probable cause. *State v. Davis*, 6 Neb. App. 790, 577 N.W.2d 763 (1998). There are, however, exceptions to the warrant requirement when "special needs," beyond the normal need for law enforcement, make the warrant and probable cause requirement impracticable. See *Griffin v. Wisconsin*, 483 U.S. 868, 107 S. Ct. 3164, 97 L. Ed. 2d 709 (1987). The U.S. Supreme Court found it reasonable to dispense with the warrant and probable cause requirements in a probation setting. See *id*. Probation, like incarceration, is a form of criminal sanction imposed by a court upon an offender after verdict, finding, or plea of guilty. *Id*.

The stop and search of Colby's vehicle and search of his person were conducted pursuant to an order by his probation officer and not pursuant to a warrant or a finding of probable cause. The Nebraska Supreme Court has considered the validity of similar searches. In *State v. Morgan*, 206 Neb. 818, 819, 295 N.W.2d 285, 286 (1980), the Nebraska Supreme Court found that a search pursuant to a condition of a probation order, requiring the probationer to "'submit to a search of his person or property at any time by any [l]aw [e]nfor[c]ement [o]fficer, with or without probable cause, for controlled substances,'" was valid. (Emphasis omitted.)

[4] The court held in *State v. Morgan* that "conditions in probation orders requiring the probationer to submit to warrantless searches, to the extent that they contribute to the rehabilitation process and are done in a reasonable manner, are valid and constitutional." 206 Neb. at 826-27, 295 N.W.2d at 289. The probationer in *State v. Morgan, supra*, had been convicted of a drug offense and placed on probation. The court determined that criminal activities in the field of drug offenses or on the part of drug offenders are frequently uncovered only through searches of the personal property of the defendant or of the defendant himself. See *id*. To the extent that the possibility of such searches restrains previously convicted drug offenders from further activity in that field, it clearly aids in the rehabilitation process. *Id*.

In *State v. Lingle*, 209 Neb. 492, 501, 308 N.W.2d 531, 537 (1981), the Nebraska Supreme Court upheld a probation condition stating that the probationer could be "'subject to the search of his personal and real property at any time, day or night, by any law enforcement or probation officer without the issuance of a search warrant.'" The court observed that the county court included other conditions in the probation order, including that the probationer refrain from the use of alcoholic beverages and narcotics. See *State v. Lingle, supra*. The court found that the warrantless search condition was reasonably related to enforcement of the other conditions of the probation order and found that the conditions were reasonably related to the rehabilitation of the probationer. See *id*.

In the instant case, Colby was sentenced to probation for a drug offense. In addition to requiring him to submit to warrantless searches, the terms of his probation order required him to report to his probation officer and refrain from using or possessing alcohol or controlled substances. The warrantless search condition was reasonably related to the enforcement of the other conditions of Colby's probation. In addition, the warrantless search condition contributes to the rehabilitation process. See *U.S. v. Knights*, 534 U.S. 112, 122 S. Ct. 587, 151 L. Ed. 2d 497 (2001) (warrantless search condition furthered two primary goals of probation—rehabilitation and protecting society from further criminal violations). See, also, *State v. Lingle, supra*; *State v. Morgan, supra*.

[5] We also conclude that the probation search was reasonable. The standards for a reasonable search of a probationer are much less than those of an ordinary citizen. See *State v. Morgan*, 206 Neb. 818, 295 N.W.2d 285 (1980). The reasonableness of a search is determined by assessing, on the one hand, the degree to which it intrudes upon an individual's privacy and, on the other, the degree to which it is needed for the promotion of legitimate governmental interests. *U.S. v. Knights, supra*. The warrantless search condition of Colby's probation significantly diminished his expectation of privacy. See *id*.

Colby clearly violated the terms of his probation. He had not reported to Witko or submitted to drug tests for "quite a time." Witko had received a tip that Colby was using drugs. Witko had more than a reasonable suspicion that Colby violated the terms of his probation. We conclude that the probation search was reasonable.

The fact that Witko was not present during the search does not make the search of Colby unreasonable. We are persuaded by the decision of the U.S. Court of Appeals for the Ninth Circuit in *U.S. v. Richardson*, 849 F.2d 439 (9th Cir. 1988), in which the court of appeals found that a probation search that was conducted by police officers, but with the permission of the probationer's probation officers, was reasonable. The court observed that given the large caseloads of most probation officers, requiring the probation officer's physical presence during every probation search or requiring close supervision of all

probation searches would unnecessarily interfere with the twin goals of probation: rehabilitation of the probationer and protection of society. See *id.*

We conclude that the stop and search of Colby's vehicle and person were valid and lawful. We further conclude that the search of Colby's residence was lawful because it was done pursuant to a search warrant that was supported by probable cause. We therefore find no merit in Colby's assignment of error.

CONCLUSION

We conclude that the probation search was lawful and that the search of Colby's residence was also a lawful search. We therefore affirm the district court's judgment overruling the motion to suppress.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V.
RANDY L. ANDERSEN, APPELLANT.
748 N.W.2d 124

Filed April 29, 2008. No. A-07-547.

1. **Pleas: Appeal and Error.** A trial court is given discretion as to whether to accept a guilty plea; an appellate court will overturn that decision only where there is an abuse of discretion.
2. **Sentences: Appeal and Error.** A sentence imposed within statutory limits will not be disturbed on appeal absent an abuse of discretion by the trial court.
3. **Judgments: Words and Phrases.** An abuse of discretion occurs when a trial court's decision is based upon reasons that are untenable or unreasonable or if its action is clearly against justice or conscience, reason, and evidence.
4. **Appeal and Error.** Plain error may be found on appeal when an error unasserted or uncomplained of at trial, but plainly evident from the record, prejudicially affects a litigant's substantial right and, if uncorrected, would result in damage to the integrity, reputation, and fairness of the judicial process.
5. **Pleas.** A plea of no contest is equivalent to a plea of guilty.
6. ____. To support a finding that a plea of guilty has been entered freely, intelligently, voluntarily, and understandingly, a court must inform the defendant concerning (1) the nature of the charge, (2) the right to assistance of counsel, (3) the right to confront witnesses against the defendant, (4) the right to a jury trial, and (5) the privilege against self-incrimination. The record must also establish a

factual basis for the plea and that the defendant knew the range of penalties for the crime charged.

7. **Sentences: Appeal and Error.** The standard of review in regard to sentencing is whether the sentence was within the statutory limits and whether the sentencing court abused its discretion.
8. **Sentences.** When imposing a sentence, a sentencing judge should consider the defendant's (1) age, (2) mentality, (3) education and experience, (4) social and cultural background, (5) past criminal record or record of law-abiding conduct, and (6) motivation for the offense, as well as (7) the nature of the offense, and (8) the amount of violence involved in the commission of the crime.
9. ____. In considering a sentence to be imposed, the sentencing court is not limited in its discretion to any mathematically applied set of factors.
10. ____. The appropriateness of a sentence is necessarily a subjective judgment and includes the sentencing judge's observation of the defendant's demeanor and attitude and all facts and circumstances surrounding the crime and the defendant's life.
11. **Homicide: Motor Vehicles: Licenses and Permits: Revocation.** A conviction based on Neb. Rev. Stat. § 28-306(3)(a) (Cum. Supp. 2004), motor vehicle homicide by reckless/willful reckless driving, does not give the sentencing court any authority to order a license revocation.

Appeal from the District Court for Douglas County: JOSEPH S. TROIA, Judge. Affirmed as modified.

Andrew J. Wilson and Kylie A. Wolf, of Walentine, O'Toole, McQuillan & Gordon, for appellant.

Jon Bruning, Attorney General, and Stacy M. Foust for appellee.

SIEVERS, CARLSON, and MOORE, Judges.

CARLSON, Judge.

INTRODUCTION

Randy L. Andersen (defendant) pled no contest to count I, a charge of motor vehicle homicide by reckless/willful reckless driving, a Class IIIA felony. The district court sentenced defendant to 5 to 5 years' imprisonment and ordered him not to drive a motor vehicle for a period of 15 years. Defendant appeals, claiming that the plea was not voluntary and that the sentence was excessive.

FACTUAL BACKGROUND

Based on a plea bargain, defendant pled no contest to motor vehicle homicide by reckless/willful reckless driving, a Class IIIA felony, on February 23, 2007. As a part of the plea agreement, the State dismissed count II, a charge of assault in the second degree, a Class IIIA felony, and agreed not to file 10 violations of a protection order, second offense, all Class IV felonies. After the plea hearing, the court adjudged defendant guilty of motor vehicle homicide by reckless/willful reckless driving and sentenced defendant to 5 to 5 years' imprisonment and a license revocation of 15 years. Defendant appeals.

The relevant facts in regard to defendant's plea and sentence will be addressed in detail in the analysis section of this opinion.

ASSIGNMENTS OF ERROR

Defendant cites two errors in his brief as follows: "[Defendant's] plea of no contest was not made knowingly, voluntarily and intelligently. . . . The sentence imposed by the lower court is excessive."

STANDARD OF REVIEW

[1] A trial court is given discretion as to whether to accept a guilty plea; an appellate court will overturn that decision only where there is an abuse of discretion. *State v. Lassek*, 272 Neb. 523, 723 N.W.2d 320 (2006).

[2] A sentence imposed within statutory limits will not be disturbed on appeal absent an abuse of discretion by the trial court. *State v. Fester*, 274 Neb. 786, 743 N.W.2d 380 (2008).

[3] An abuse of discretion occurs when a trial court's decision is based upon reasons that are untenable or unreasonable or if its action is clearly against justice or conscience, reason, and evidence. *State v. Archie*, 273 Neb. 612, 733 N.W.2d 513 (2007).

[4] Plain error may be found on appeal when an error unasserted or uncomplained of at trial, but plainly evident from the record, prejudicially affects a litigant's substantial right and, if uncorrected, would result in damage to the integrity, reputation,

and fairness of the judicial process. *State v. Mlynarik*, 16 Neb. App. 324, 743 N.W.2d 778 (2008).

ANALYSIS

Plea.

Defendant entered a plea of no contest and was adjudged guilty by the district court of motor vehicle homicide by reckless/willful reckless driving pursuant to Neb. Rev. Stat. § 28-306(3)(a) (Cum. Supp. 2004). Defendant alleges, in his first error, that his plea of no contest was not done freely, intelligently, voluntarily, and understandingly.

[5,6] The requirements of such a plea were reiterated in the case of *State v. Lassek, supra*, wherein it was pointed out that a plea of no contest is equivalent to a plea of guilty. To support a finding that a plea of guilty has been entered freely, intelligently, voluntarily, and understandingly, a court must inform the defendant concerning (1) the nature of the charge, (2) the right to assistance of counsel, (3) the right to confront witnesses against the defendant, (4) the right to a jury trial, and (5) the privilege against self-incrimination. The record must also establish a factual basis for the plea and that the defendant knew the range of penalties for the crime charged. *Id.* A trial court is given discretion as to whether to accept a guilty plea; an appellate court will overturn that decision only where there is an abuse of discretion. *Id.* With these parameters and guidelines in mind, we turn to the record to determine whether defendant was adequately informed of his rights, whether he knew the range of penalties, and whether there was a factual basis for the plea.

The thrust of defendant's argument is that in his mind, the offense should have been a misdemeanor instead of a felony and that he should have gotten some type of a preagreement on his sentence. The record is not supportive of defendant's argument.

The following excerpts from the record highlight some of defendant's complaints but show the plea herein was made freely, intelligently, voluntarily, and understandingly.

THE COURT: . . . [Y]ou've had an opportunity to talk to your attorney. What is it you wish to do at this time?

THE DEFENDANT: I'm not going to waste the Court's time, never have, never will. I'm going to plead no contest.

THE COURT: To Count I?

[Counsel for defendant]: Count I.

THE COURT: I take it pursuant to the plea agreement that was mentioned when we started where the State would dismiss Count II and not file on ten counts of violation of a protection order?

[Counsel for defendant]: That's correct.

THE COURT: Okay. Is that your understanding . . . ?

THE DEFENDANT: Yes.

THE COURT: Okay. And is a no contest plea acceptable to the State?

[Counsel for the State]: Yes.

THE COURT: Do you understand . . . that a no contest plea will be treated the same as a plea of guilty as far as sentencing goes?

THE DEFENDANT: Yeah.

THE COURT: Is that a yes?

THE DEFENDANT: Yes.

. . . .

THE COURT: Do you understand the maximum possible penalty for this charge is five years in jail and a $10,000 fine? The Court doesn't have to put you in jail for five years. It could be a day on up, and the Court doesn't have to fine you $10,000. It could be a dollar on up. Do you understand?

THE DEFENDANT: Yes.

. . . .

THE COURT: Has anybody told you or led you to believe that by entering your plea of no contest you would receive probation, be given a light sentence or in any way rewarded for pleading no contest?

THE DEFENDANT: (No audible answer.)

THE COURT: Has anybody told you what's going to happen?

THE DEFENDANT: (No audible answer.)

THE COURT: There's been discussion of what you would like to happen, but has anybody told you what your sentence is going to be?

THE DEFENDANT: (No audible answer.)

THE COURT: Did your attorney tell you what your sentence was going to be?

THE DEFENDANT: No.

THE COURT: Did anybody else tell you what your sentence would be? Nobody's told you you're going to get the minimum and nobody told you you're not going to get the maximum, is that correct, or any specific number as far as jail time?

THE DEFENDANT: I was told in November I was going to get 20 to 30 months time served.

THE COURT: Who told you that?

THE DEFENDANT: It was a plea thing that the lawyer told me, but no.

THE COURT. Okay.

[Counsel for defendant]: As his attorney, I have told him that's what I would ask for. As we have discussed —

THE DEFENDANT: Until these letters came up.

[Counsel for defendant]: — many times, that is not part of the plea deal. It's been one of the frustrations [defendant] has expressed with me, is that he wants the sentence guaranteed, and I've expressed to him —

THE DEFENDANT: I said I wanted it in writing.

[Counsel for defendant]: And I said it was not guaranteed.

THE DEFENDANT: That was in November.

THE COURT: Do you understand that what your attorney tells you, you know, is something that is recommended to the Court under the circumstances, but the Court is not bound by that?

THE DEFENDANT: Yeah, I was told that today.

THE COURT: All right. All right. You're still willing to proceed?

THE DEFENDANT: I'm done with this. I want it over with.

. . . .

THE COURT: Okay. The charge, Count I, is that on or about the 26th day of November, 2005, in Douglas County, you unintentionally caused the death of Jay Hinchman.

[Counsel for the State]: Hinchman.

THE COURT: Jay Hinchman, while engaged in the unlawful operation of a motor vehicle and in violation of Section [6]0-6,213 or Section 60-6,214.

THE DEFENDANT: What's those sections for?

[Counsel for the State]: That would be reckless and willful reckless driving.

THE COURT: Either reckless or willful reckless driving. That's what you're charged under.

THE DEFENDANT: Which is one — or willful, one, disregard for human life, conscious or deliberate is substates and counties.

THE COURT: Well, that's the charge as set out. Do you still wish to plead no contest to that charge?

THE DEFENDANT: I have no choice, yes.

THE COURT: Well, you can say, no, I don't want to and, you know —

THE DEFENDANT: And we wait another year? No, I don't want to wait another year.

. . . .

THE COURT: Before I can accept your plea, I have to be satisfied there's a factual basis for the charge. Is the State going to give the factual basis?

[Counsel for the State]: On November 26th, 2005, here in Douglas County, Nebraska, the defendant was operating a motor vehicle and turned onto Farnam Street heading the wrong way on a one-way street. The defendant then struck a car being driven by the victim, Jay Hinchman, at approximately 33rd Street and Farnam Street, which caused the car driven by Mr. Hinchman to spin 180 degrees and strike a guardrail. According to the coroner's — excuse me, the medical examiner's report, Mr. Hinchman died as a result of the injuries sustained in that accident.

> The defendant did show some signs of alcohol impairment to Omaha police officers following a legal blood draw, his BAC tested at a 0.61. There was also the presence of marijuana in his urine. All those events occurred here in Douglas County, Nebraska.
>
> . . . .
>
> THE COURT: Do you believe that [defendant's] plea of no contest is consistent with the law the facts and in his best interests?
>
> [Counsel for defendant]: Yes.
>
> THE COURT: All right. . . . [T]he Court finds beyond a reasonable doubt that you understand the nature of the charge against you to which you pled no contest to; that you understand the possible penalties; that your plea is entered freely, knowingly, intelligently; that there is a factual basis for your plea. The Court grants you leave to withdraw your previously entered plea of not guilty, accepts your plea of no contest, finds and adjudges you guilty of the charge. The matter will be referred for a Presentence investigation.

Based on a careful review of the total record, we find no abuse of discretion and that this error has no merit. We agree with the summation of the State in its brief that defendant's arguments are founded upon comments made by him which have been taken out of the context of the entire plea hearing. The fact that defendant did not agree with the evidence, whether he should be charged with a misdemeanor or felony, and what his final sentence should be does not change that his plea was made freely, intelligently, voluntarily, and understandingly. The district court explained to him that he would be pleading no contest to a felony and that his sentence would be within the discretion of the court despite the recommendations of counsel.

Excessive Sentence.

[7] The district court sentenced defendant to 5 to 5 years' imprisonment based on his plea to count I, motor vehicle homicide by reckless/willful reckless driving, a Class IIIA felony. Count I was punishable by up to 5 years' imprisonment,

a $10,000 fine, or any combination of the two. Neb. Rev. Stat. § 28-105 (Cum. Supp. 2006). The standard of review in regard to sentencing is whether the sentence was within the statutory limits and whether the sentencing court abused its discretion. See, *State v. Fester*, 274 Neb. 786, 743 N.W.2d 380 (2008); *State v. Archie*, 273 Neb. 612, 733 N.W.2d 513 (2007).

It is clear that the sentence was within the statutory limitations. Defendant argues that although he has had a troubled past, he has made efforts to take control of his admitted drinking problem. In response, the State points to defendant's extensive criminal history (six pages in the presentence investigation report). Defendant has been convicted of multiple counts of driving during suspension, driving under the influence, and possession of less than 1 ounce of marijuana, among many other convictions. He has a previous felony conviction for the offense of felony criminal mischief in which he was sentenced to an imprisonment of 30 to 60 months. It should be noted that defendant benefited from a plea bargain in which the prosecutor dismissed and agreed not to file 11 felony charges.

[8-10] When imposing a sentence, a sentencing judge should consider the defendant's (1) age, (2) mentality, (3) education and experience, (4) social and cultural background, (5) past criminal record or record of law-abiding conduct, and (6) motivation for the offense, as well as (7) the nature of the offense, and (8) the amount of violence involved in the commission of the crime. *State v. Fester, supra.* We have further held that, in considering a sentence to be imposed, the sentencing court is not limited in its discretion to any mathematically applied set of factors. *Id.* Obviously, depending on the circumstances of a particular case, not all factors are placed on a scale and weighed in equal proportion. The appropriateness of a sentence is necessarily a subjective judgment and includes the sentencing judge's observation of the defendant's demeanor and attitude and all facts and circumstances surrounding the crime and the defendant's life. *Id.*

Based on the criteria set in the law, we find no support for the argument that the court abused its discretion in defendant's sentence of imprisonment.

Plain Error.

As a part of defendant's sentence, the court suspended defendant's driver's license for a period of 15 years. The State has conceded that the district court erred in imposing any time period of license revocation for defendant under the statute to which he pled and was found guilty. It is clear that the statute, § 28-306(3)(a), contains no provision for a license revocation. The portion of § 28-306(3)(a) in question simply reads as follows: "If the proximate cause of the death of another is the operation of a motor vehicle in violation of section 60-6,213 or 60-6,214, motor vehicle homicide is a Class IIIA felony." Neb. Rev. Stat. §§ 60-6,213 and 60-6,214 (Reissue 2004) refer to the statutes on reckless and willful reckless driving, respectively. These statutes have no penalty provisions.

[11] We find that under the present state of Nebraska law, a conviction of the above provision, motor vehicle homicide by reckless/willful reckless driving, does not give the sentencing court any authority to order a license revocation. As a result, we find plain error and vacate that portion of defendant's sentence that ordered defendant not to operate a motor vehicle for a period of 15 years. Plain error may be found on appeal when an error unasserted or uncomplained of at trial, but plainly evident from the record, prejudicially affects a litigant's substantial right and, if uncorrected, would result in damage to the integrity, reputation, and fairness of the judicial process. *State v. Mlynarik, ante* p. 324, 743 N.W.2d 778 (2008).

CONCLUSION

We therefore affirm the district court's judgment in all respects, except that we modify the sentencing order in regard to the license revocation.

AFFIRMED AS MODIFIED.

TERENCE KUEHL, APPELLANT, V. FIRST COLONY LIFE INSURANCE COMPANY, APPELLEE.

749 N.W.2d 491

Filed May 13, 2008. No. A-06-1170.

1. **Insurance: Contracts: Appeal and Error.** The interpretation of an insurance policy is a question of law, in connection with which an appellate court has an obligation to reach its own conclusions independently of the determination reached by the trial court.
2. **Summary Judgment.** Summary judgment is proper when the pleadings and evidence admitted at the hearing disclose that there is no genuine issue as to any material fact or as to the ultimate inferences that may be drawn from those facts and that the moving party is entitled to judgment as a matter of law.
3. **Summary Judgment: Appeal and Error.** In reviewing a summary judgment, an appellate court views the evidence in a light most favorable to the party against whom the judgment is granted and gives such party the benefit of all reasonable inferences deducible from the evidence.
4. **Insurance: Contracts.** Insurance contracts, like other contracts, are to be construed according to the sense and meaning of the terms which the parties have used. If the terms of the contract are clear and unambiguous, they are to be taken and understood in their plain, ordinary, and popular sense.
5. ____: ____. An ambiguity exists in an insurance contract only when the policy can be interpreted to have two or more reasonable meanings.
6. ____: ____. The language of an insurance policy should be read to avoid ambiguities, if possible, and the language should not be tortured to create them.
7. **Appeal and Error.** An appellate court is not obligated to engage in an analysis that is not needed to adjudicate the controversy before it.
8. **Insurance: Fraud: Contracts.** In the absence of fraud or misrepresentation, a health defect existing but undetected on the date of the medical examination cannot later be advanced as a breach of a continued insurability clause.
9. ____: ____: ____. An applicant for life insurance has no duty to voluntarily inform the insurer of new information about his health which arises after a medical examination by the insurer.

Appeal from the District Court for Douglas County: JOHN D. HARTIGAN, JR., Judge. Affirmed.

Richard J. Rensch, of Raynor, Rensch & Pfeiffer, P.C., for appellant.

Kyle Wallor and John M. Walker, of Lamson, Dugan & Murray, L.L.P., for appellee.

SIEVERS, CARLSON, and MOORE, Judges.

MOORE, Judge.

INTRODUCTION

In this declaratory judgment action, Terence Kuehl sought to establish his entitlement to the proceeds of a life insurance policy issued by First Colony Life Insurance Company to Terence's deceased wife, Deborah Kuehl. The district court for Douglas County entered an order sustaining the company's motion for summary judgment and dismissing the action, finding that Deborah failed to satisfy a condition precedent required by the company and that the policy therefore never went into effect. We affirm the decision of the district court.

BACKGROUND

In November 2003, Deborah obtained a life insurance policy from the company. Deborah died on March 23, 2004. On April 12, Terence, as primary beneficiary under the policy, submitted a "Proof of Loss" to the company. Following an investigation, the company denied the claim for death benefits. On July 30, Terence filed a petition for declaratory judgment, seeking a declaration that the company wrongfully denied Terence's claim for death benefits and that the company is obligated to pay the $600,000 death benefits together with costs pursuant to Neb. Rev. Stat. § 44-359 (Reissue 2004). In its answer, the company admitted that it issued a life insurance policy. Also in its answer, the company, after admitting and denying various allegations, affirmatively alleged that Deborah made material misrepresentations during the course of the application and delivery process which rendered the policy void ab initio and, further, that Deborah failed to meet all conditions precedent to the policy by failing to advise the company of the change in her health status.

On May 10, 2006, the company filed a motion for summary judgment, and a hearing was held on the motion on July 17. Various depositions, affidavits, and discovery responses were admitted in evidence, which we now summarize.

The facts of this case are largely undisputed. In August 2003, Steven Violett, an independent insurance agent who had obtained life insurance policies for the Kuehls in the past, suggested that Deborah could obtain a better rate if she purchased

a $600,000 life insurance policy from the company as a substitute for two existing $300,000 policies issued by other companies. On September 5, Deborah completed an application to the company. In this application, Deborah checked the box which indicated that she currently uses tobacco or other nicotine products. At the bottom of the application form, immediately above Deborah's signature, is the following language:

> I represent: (1) the statements and answers given in the application are true, complete, and correctly recorded to the best of my knowledge and belief . . . .
>
> I agree that: (1) I will notify the Insurer if any statement or answer given in the application changes prior to policy delivery; and (2) except as provided in the Temporary Insurance Application and Agreement, if any, insurance will not begin unless all persons proposed for insurance are living and insurable as set forth in the application at the time a policy is delivered to the Owner and the first modal premium is paid.

(Emphasis omitted.)

"Part I" of the application was completed by Deborah on September 5, 2003. "Part II" of the application, the "Medical History," was completed on September 12 in conjunction with the insurance medical examination conducted on that day by Jo Myers, a medical examiner retained by the company. Myers testified in her deposition that she completed the information on the medical history by recording the answers given to her by Deborah. In addition to completing the written medical history, Myers obtained Deborah's height, weight, blood pressure, and pulse, along with an EKG reading. The medical questions asked by Myers of Deborah were preceded with this language: "In the past 10 years, have you had, been treated for, or been medically advised to be treated for, any of the following?" Deborah answered "No" to the questions concerning bronchitis, cancer, coughing up blood, chronic lung disorder, and tumor, mass, or lump. In the "Details" section of the medical history, Myers recorded that Deborah was last seen 5 years ago for a sinus infection and put on an antibiotic and that she was seen by her gynecologist in January 2003 for a "Pap and a mammogram." Also noted in this section was that Deborah's mother died of

lung cancer at age 58 and that her father had alcoholism and died of pneumonia at age 62. Immediately above Deborah's signature on the medical history form is the identical language noted above from part I of the application.

Due to a problem with the EKG machine, Myers was required to obtain another EKG reading from Deborah, which she did at Deborah's home on October 8, 2003. Myers testified that Deborah did not advise her of any changes in her health since completing the medical history on September 12.

The company issued a life insurance policy on November 7, 2003, which was delivered to Deborah by Violett on November 14. The "Policy Delivery Acknowledgment" form was signed by Deborah on November 14, and it stated:

> By signing below, I confirm that on the Date of this Acknowledgment: (1) the Policy identified by the number above was delivered to me; (2) the first modal premium for this Policy was paid; and (3) all persons proposed for insurance under this Policy were living and insurable as described in each part of the application for this Policy.
>
> Coverage under this Policy will begin on the date this Acknowledgment is signed and given to a Company representative along with the first modal premium payment provided all persons proposed for insurance under this Policy are living and insurable as described in each part of the application for this Policy.

The first premium payment was made by Deborah. Violett indicated that Deborah did not advise him that she was spitting up blood, nor that she had a chronic lung disorder or lung cancer, between the time of the application and the delivery of the policy.

According to Terence, Deborah began having trouble with spitting up blood around the middle of October 2003. Dr. Martin Mancuso, who practices internal medicine, was Deborah's primary care physician since 1986. Mancuso testified that he treated Deborah several times for chronic bronchitis and other respiratory infections prior to 2003. On October 9, 2003, Deborah had an office visit with Mancuso in which she indicated that she had been coughing up blood for 2 to 3 weeks. An x ray performed on October 9 in Mancuso's office revealed a "suspicious" shadow

or mass which Mancuso discussed with Deborah, at which time he "probably" said it could be cancer. Mancuso's impressions at the time of the October 9 visit included chronic lung disease. Following a CT scan on October 14, a positron emission tomography scan on October 16, and a biopsy on October 30, Deborah was diagnosed with "[m]etastatic non-small cell carcinoma." On November 3, Deborah had a consultation for potential treatment of the carcinoma of her lung. Deborah passed away on March 28, 2004, as a result of the lung cancer.

Terence testified that between September 5 and November 14, 2004, he did not discuss with Violett the change in Deborah's health. Violett came to the Kuehls' place of business on October 23 to pick up the premium check. Neither Terence or Deborah told Violett at that time about Deborah's spitting up blood or that x rays revealed a tumor in her lung. Nor did the Kuehls advise Violett of Deborah's medical condition at the time Violett delivered the policy on November 14. Terence admitted that as of November 14, both he and Deborah knew that she had been diagnosed with, and was actively treating for, lung cancer.

The vice president and chief underwriter for the company stated in his affidavit that Deborah's failure to disclose coughing up blood and the diagnostic testing she underwent were material to the underwriting of the policy and that had the company been informed of these events, it would not have allowed the policy to be delivered and would have made no offer of insurance until the cause of the coughing up of blood was determined, the testing was completed, and a diagnosis was made. He stated that had the company been advised of the diagnosis of lung cancer, it would have declined any insurance coverage on Deborah's life. He further opined that Deborah was not insurable under the company on November 14, 2003, the date of policy delivery.

On October 10, 2006, the district court entered a detailed, eight-page order, granting the company's summary judgment motion and dismissing Terence's petition with prejudice. Terence timely appeals.

ASSIGNMENTS OF ERROR

Terence asserts, combined and restated, that the district court erred in finding that the insurance policy was plain and

unambiguous and in granting the company's motion for summary judgment.

STANDARD OF REVIEW

[1] The interpretation of an insurance policy is a question of law, in connection with which an appellate court has an obligation to reach its own conclusions independently of the determination reached by the trial court. *Jones v. Shelter Mut. Ins. Cos.*, 274 Neb. 186, 738 N.W.2d 840 (2007).

[2,3] Summary judgment is proper when the pleadings and evidence admitted at the hearing disclose that there is no genuine issue as to any material fact or as to the ultimate inferences that may be drawn from those facts and that the moving party is entitled to judgment as a matter of law. *Peterson v. Ohio Casualty Group*, 272 Neb. 700, 724 N.W.2d 765 (2006). In reviewing a summary judgment, an appellate court views the evidence in a light most favorable to the party against whom the judgment is granted and gives such party the benefit of all reasonable inferences deducible from the evidence. *Id.*

ANALYSIS

Is Insurance Policy Plain and Unambiguous?

[4-6] Insurance contracts, like other contracts, are to be construed according to the sense and meaning of the terms which the parties have used. If the terms of the contract are clear and unambiguous, they are to be taken and understood in their plain, ordinary, and popular sense. *Fokken v. Steichen*, 274 Neb. 743, 744 N.W.2d 34 (2008). An ambiguity exists in an insurance contract only when the policy can be interpreted to have two or more reasonable meanings. *Id.* The language of an insurance policy should be read to avoid ambiguities, if possible, and the language should not be tortured to create them. *Hillabrand v. American Fam. Mut. Ins. Co.*, 271 Neb. 585, 713 N.W.2d 494 (2006).

The district court in this case found that the condition precedent requiring the insurance applicant to "'notify the Insurer if any statement or answer given in the application changes prior to policy delivery'" is clear and unambiguous. The court stated that a literal and plain reading of the clause demonstrates that

it required the insurance applicant to inform the company of any change in the statements made in the application, including whether the applicant had been treated for "coughing up of blood" or "cancer." The court found that there is no other meaning which can be given to these policy provisions and that no ambiguity exists which requires construction.

[7] In his brief, Kuehl does not argue that the language regarding notification of changes to answers given in the application is ambiguous. Rather, he concentrates on the language regarding being "insurable" at the time the policy is delivered. However, the district court did not address this language in its decision. The focus of the district court was upon the contractual obligation of the applicant to "'notify the Insurer if any statement given in the application changes prior to policy delivery.'" We agree with the district court that this provision is clear and unambiguous and, as discussed below, is dispositive of the case. Therefore, we need not address the issue of whether the language regarding being "insurable" is ambiguous. An appellate court is not obligated to engage in an analysis that is not needed to adjudicate the controversy before it. *Fokken v. Steichen, supra*.

Did Deborah Fail to Meet Condition Precedent?

The district court found that it is undisputed that between the time Deborah signed the application indicating she had never coughed up blood or had cancer and the effective date of her policy, her answers to those questions changed. The court concluded that Deborah had an obligation to update the answers given in her application for those changes in health and that because she failed to meet that condition precedent, the insurance contract never became effective.

Nebraska case law has recognized in the insurance context that a condition precedent must be performed before the agreement becomes a binding contract, and a condition precedent must be fulfilled before a duty to perform the contract arises. See *Coppi v. West Am. Ins. Co.*, 247 Neb. 1, 524 N.W.2d 804 (1994). This proposition was applied relative to a health insurance contract in *Donaldson v. Farm Bureau Life Ins. Co.*, 232 Neb. 140, 440 N.W.2d 187 (1989). In that case, the Nebraska

Supreme Court held that a condition precedent to the formation of the insurance contract was a requirement that the insured not have existing health coverage with another insurer and that the insured's failure to cancel other coverage precluded the formation of a new policy of insurance with the defendant. See, also, *Adolf v. Union Nat. Life Ins. Co.*, 170 Neb. 38, 101 N.W.2d 504 (1960) (failure of applicant to meet condition to submit to medical examination resulted in no contract of insurance).

Kuehl argues that the district court's decision is directly contrary to the holding of *Ortega v. North American Co. for L. & H. Ins.*, 187 Neb. 569, 193 N.W.2d 254 (1971). The facts of *Ortega* are very similar to the case at hand, in that between the time of the application for life insurance and the receipt of the policy, the insured experienced an episode of coughing up blood, consulted with a doctor, and had x rays taken which showed a shadow on his lung, indicating a possible malignancy. He died from complications resulting from surgery for removal of his lung, which occurred shortly after delivery of the policy. The insurer rejected his widow's claim, and she brought a declaratory judgment action. The district court entered judgment for the insurer following a jury verdict. The Supreme Court reversed the judgment, finding that the insured did not breach any duty to disclose material information about his health which he learned after the application and medical examination by the insurer.

[8] The focus of the Supreme Court's decision in *Ortega* was on the following policy language contained in the application:

> "The insurance policy hereby applied for shall not be considered in force until a policy shall have been issued by the Company . . . and said policy received and accepted by the Owner and the first premium paid thereon, all during the continued insurability of the person to be insured . . . ."

187 Neb. at 571, 193 N.W.2d at 255-56 (emphasis omitted). The Supreme Court analyzed the continued insurability clause, noting that its function is to protect the insurer against sudden changes in health arising in the interval between a medical examination and the consummation of the policy. The court found that the approval by the insurer of the application, the subsequent delivery of the policy, and the acceptance of the

premium raised a presumption that all conditions precedent such as continued insurability had been met and that this presumption was sufficient to sustain the plaintiff's burden of proof unless the insurer introduced evidence to rebut it. The court noted that the insurer set up the conditions and requirements by which it would determine the insurability of the insured, namely a medical examination and the insurer's doctor's approval of the insured as insurable. The court found that the insured complied in every respect with the requirements and conditions that the insurer required. The court held that, in the absence of fraud or misrepresentation, a health defect existing but undetected on the date of the medical examination cannot later be advanced as a breach of a continued insurability clause.

[9] There are two distinctions between *Ortega, supra*, and the case at hand which render its holding inapplicable to this case: the first difference being a factual distinction and the second, more important, difference being the policy language. First, in *Ortega*, neither the insured nor his doctors, including the thoracic surgeon, had any confirmed information as to the status of the malignancy until the surgery which resulted in his death, which was at least 2 days after delivery of the policy. In the present case, Deborah had a confirmed diagnosis of lung cancer 2 weeks before delivery of the policy. More important, however, is the difference in the policy language. In *Ortega v. North American Co. for L. & H. Ins.*, 187 Neb. 569, 193 N.W.2d 254 (1971), the insurer's position that the insured breached a condition precedent to coverage related solely to the continued insurability language of the policy. In *Ortega*, there was no contractual obligation of the insured to notify the insurer of any change in health status before delivery of the policy. The court in *Ortega* referred to the general rule that an applicant for life insurance has no duty to *voluntarily* inform the insurer of new information about his health which arises after a medical examination by the insurer. See *Merriman v. Grand Lodge Degree of Honor*, 77 Neb. 544, 110 N.W. 302 (1906) (insured not required to inform insurer of evidence of pregnancy discovered subsequently to physical examination and application for life insurance).

The difference between this case and *Ortega, supra*, is that in this case the insured had a contractual duty to inform the insurer

of new information concerning statements in the application prior to policy delivery. Nebraska case law has not addressed this specific language in the context of a life insurance contract. At least one other jurisdiction has addressed a policy provision very similar to the one at issue here in the context of conditions precedent to formation of the contract. The Sixth Circuit discussed the effect of the following policy provision contained in an application for life insurance: "'I understand that if my health or any of my answers or statements change prior to delivery of the policy, I must so inform the [insurer] in writing.'" *Abella v. Jackson National Life Ins. Co.*, No. 97-3498, 1998 WL 708706 at *1 (6th Cir. Oct. 1, 1998) (unpublished disposition listed in table of "Decisions Without Published Opinions" at 165 F.3d 26 (6th Cir. 1998)). In the application, the insured stated that he had never had any indication of chest pain, discomfort, or palpitations, that he had not had an electrocardiogram or x ray, and that he had not been advised to have any such diagnostic tests. After completion of the application, but before delivery of the policy, the insured experienced chest pains for which he underwent testing. The insured did not inform the insurer of these changes prior to delivery of the policy. The Sixth Circuit held that the provision requiring the insured to inform the insurer of changes in his answers was a condition precedent to coverage and, accordingly, affirmed the district court's grant of summary judgment in favor of the insurer. See, also, *Willard v. Valley Forge Life Ins. Co.*, 218 F. Supp. 2d 1197, 1201 (C.D. Cal. 2002) (application provided insurance would "not take effect until the application is approved and accepted . . . and the policy is delivered while the health of each person proposed for insurance and other conditions remain as described in the application" (emphasis omitted)).

We find the rationale in *Abella, supra*, to be persuasive. We conclude that the requirement in the company's policy that the insured notify the insurer of any changes in statements given in the application for insurance prior to policy delivery was a condition precedent to the formation of the insurance contract. This notification requirement was a condition of the contract which Deborah acknowledged and signed, and which she failed to satisfy. Deborah's answers to several questions in

the application changed between September 12, 2003, the date of the medical history and examination, and November 14, the date of the policy delivery. Specifically, the questions relating to having been treated for coughing up blood, cancer, chronic lung disorder, and tumor, mass, or lump required a change in answer from "No" to "Yes" during this time period. Deborah's failure to notify the company of the changes precluded the formation of the insurance contract.

We conclude that the district court did not err in finding that the life insurance policy never went into effect and in granting summary judgment in favor of the company.

CONCLUSION

Because a condition precedent to the formation of the contract of life insurance was not fulfilled, the life insurance policy never went into effect. We affirm the district court's grant of summary judgment in favor of the company.

AFFIRMED.

STATE OF NEBRASKA, APPELLANT, V.
EMILY M. HANSEN, APPELLEE.
749 N.W.2d 499

Filed May 13, 2008. No. A-07-1014.

1. **Judgments: Appeal and Error.** With respect to questions of law, an appellate court has an obligation to reach an independent conclusion, irrespective of the decision of the court below.
2. **Statutes.** When the words of a statute are plain, direct, and unambiguous, no interpretation is necessary or will be indulged to ascertain meaning.
3. **Sentences: Prior Convictions.** Neb. Rev. Stat. § 60-6,197.03 (Supp. 2005) provides enhanced penalties by enhancing the conviction presently before the court for which sentencing is occurring in the event there are prior convictions.
4. **Sentences: Prior Convictions: Drunk Driving: Blood, Breath, and Urine Tests.** Neb. Rev. Stat. § 60-6,197.02 (Supp. 2005) is structured by first articulating the two different crimes for which there can be enhancement because of a prior conviction. The first category of crime is for a violation of Neb. Rev. Stat. § 60-6,196 (Reissue 2004), driving under the influence, and the second category of crime is for a violation of Neb. Rev. Stat. § 60-6,197 (Reissue 2004), refusal to submit to a chemical test.

5. ____: ____: ____: ____. When a judge is sentencing for a violation of the driving under the influence statute, the present offense can be enhanced by prior driving under the influence convictions, and when a judge is sentencing for a violation of the refusal to submit to a chemical test statute, the offense then before the court can be enhanced, but only by prior refusal convictions.
6. ____: ____: ____: ____. Under the plain language of Neb. Rev. Stat. § 60-6,197.02 (Supp. 2005), when sentencing for a driving under the influence conviction, a previous refusal to submit to chemical testing conviction is not in the list of convictions that are prior convictions for the purpose of enhancement, and when sentencing for a refusal conviction, a previous driving under the influence conviction is not in the list of prior convictions which can be used to enhance the refusal conviction.

Appeal from the District Court for Buffalo County, JOHN P. ICENOGLE, Judge, on appeal thereto from the County Court for Buffalo County, GERALD R. JORGENSEN, JR., Judge. Judgment of District Court affirmed.

Shawn R. Eatherton, Buffalo County Attorney, and Michele J. Romero for appellant.

No appearance for appellee.

SIEVERS, CARLSON, and MOORE, Judges.

SIEVERS, Judge.

Emily M. Hansen pled no contest to driving while under the influence (DUI) with a blood alcohol content of .15 or greater, and the State sought to enhance such conviction to a second offense. Enhancement was denied by the county court for Buffalo County on the basis that Hansen's earlier conviction for refusal to submit to alcohol testing cannot be used to enhance the instant conviction to a second offense under Neb. Rev. Stat. § 60-6,197.03 (Supp. 2005), because such conviction is not a "prior conviction" as defined under Neb. Rev. Stat. § 60-6,197.02 (Supp. 2005). The county court's decision was affirmed by the district court for Buffalo County. The State sought leave to docket error proceedings, which we granted on September 24, 2007. Hansen has now moved for summary affirmance, which we hereby deny because the case is a matter of first impression and therefore not appropriate for summary disposition. However, we have determined that the case can be

resolved without oral argument. See Neb. Ct. R. of Prac. 11 (rev. 2006).

PROCEDURAL AND FACTUAL BACKGROUND

After denying enhancement, the trial court sentenced Hansen to a $500 fine and 60 days' incarceration on the DUI conviction. A conviction for driving with a revoked license was handled at the same time, for which conviction Hansen was sentenced to an additional 30 days' incarceration, such sentences to be served consecutively. On the DUI conviction, her license was revoked for 1 year. Hansen appealed this sentence to the district court for Buffalo County, asserting that the sentence was excessive. The State filed a timely cross-appeal under Neb. Rev. Stat. § 29-2317 (Cum. Supp. 2006), contesting the county court's failure to enhance the DUI conviction to a second offense. The district court rejected Hansen's argument that the county court's sentence was excessive and that she should have received probation. The district court also found that a prior conviction under Neb. Rev. Stat. § 60-6,197 (Reissue 2004), the refusal statute, cannot be used to enhance a conviction under Neb. Rev. Stat. § 60-6,196 (Reissue 2004), the DUI statute, under the enhanced penalty provisions of § 60-6,197.03. Pursuant to the provisions of Neb. Rev. Stat. § 29-2315.01 (Cum. Supp. 2006), the State filed an application for leave to docket error proceedings before this court to determine the question of whether a DUI conviction can be enhanced by a prior conviction for refusal of a chemical test.

ASSIGNMENT OF ERROR

The State asserts that the trial court, and in turn the district court, erred in failing to enhance Hansen's conviction for DUI, "over .15," under § 60-6,196 to a second offense based on a prior conviction for refusal to submit to a chemical test under § 60-6,197.

STANDARD OF REVIEW

[1] With respect to questions of law, an appellate court has an obligation to reach an independent conclusion, irrespective of the decision of the court below. See *State v. Sanders*, 269 Neb. 895, 697 N.W.2d 657 (2005).

ANALYSIS

The issue presented by the State's appeal in this case is whether a prior conviction for a violation of § 60-6,197, the refusal statute, can be used to enhance the conviction for violation of § 60-6,196, the DUI statute, to a second offense when an offender is sentenced under § 60-6,197.03. The last cited statute contains the penalty provisions for sentencing for either refusal to submit to a chemical test or DUI. There is no dispute that Hansen had a prior conviction for refusal under § 60-6,197 and that such was within the statute's 12-year "qualifying" timeframe. That said, whether enhancement is permissible is determined by the definition of "prior conviction" found in § 60-6,197.02, entitled "Driving under influence of alcoholic liquor or drugs; implied consent to submit to chemical test; terms, defined; prior convictions; use," and we quote the pertinent portions of the statute:

> (1) A violation of section 60-6,196 or 60-6,197 shall be punished as provided in section 60-6,197.03. For purposes of sentencing under section 60-6,197.03:
>
> (a) Prior conviction means a conviction for a violation committed within the twelve-year period prior to the offense for which the sentence is being imposed as follows:
>
> (i) For a violation of section 60-6,196:
>
> (A) Any conviction for a violation of section 60-6,196;
>
> (B) Any conviction for a violation of a city or village ordinance enacted in conformance with section 60-6,196;
>
> (C) Any conviction under a law of another state if, at the time of the conviction under the law of such other state, the offense for which the person was convicted would have been a violation of section 60-6,196; or
>
> (D) Any conviction for a violation of section 60-6,198; or
>
> (ii) For a violation of section 60-6,197[:]
>
> (A) Any conviction for a violation of section 60-6,197;
>
> (B) Any conviction for a violation of a city or village ordinance enacted in conformance with section 60-6,197; or
>
> (C) Any conviction under a law of another state if, at the time of the conviction under the law of such other

> state, the offense for which the person was convicted would have been a violation of section 60-6,197.

The district court's order affirming the county court's denial of enhancement reasoned as follows with reference to § 60-6,197.02:

> The purpose of [§ 60-6,197.02] is to define a prior conviction when a person is convicted under section 60-6,196 or 60-6,197 of the Nebraska statutes. A plain reading of the statute indicates the legislature's intent to define prior conviction separately when a person is convicted for a violation of section 60-6,196 and when they are convicted of a violation [of] section 60-6,197. The decision to define prior convictions differently for the two offenses is readily apparent in that the definitions . . . are set forth in separate subparagraphs notably (i) and (ii). Although the statutory language is not as clear as it could have been and no legislative history has been provided to this court by either party, this court believes that the interpretation of the statute by the county court was in fact proper and the appeal of the State is without merit.

This causes us to turn to the county court's decision not to enhance the instant conviction for DUI, "more than .15," because the earlier conviction for refusal under § 60-6,197 was not a qualifying "prior conviction." The county court, in its comments from the bench in refusing to enhance, reasoned that it did not see any "cross over" in § 60-6,197.02 in that "[r]efusal isn't listed under DUI and DUI isn't listed under [r]efusal." Hansen's memorandum brief argues first that the elements of the crimes of DUI and refusal to submit to chemical testing are different, and of course we agree. Hansen then submits, and we quote:

> It is simply strained logic to assert that a motorist having been convicted of previously refusing a chemical test is presumed to have been under the influence and therefore that previous conviction can be used to enhance a subsequent [DUI] conviction. These are two crimes that although related to driving, are completely different and just happen to have the same penalty. To commit one offense in 2006 and a completely different offense in 2007 and enhance [its] penalty defies reason.

[2-4] The State's position is simply that we need only give the statutory language of § 60-6,197.02 its plain and ordinary meaning, and when the words of a statute are plain, direct, and unambiguous, no interpretation is necessary or will be indulged to ascertain meaning. See *State v. Flye*, 245 Neb. 495, 513 N.W.2d 526 (1994). Section 60-6,197.03 provides enhanced penalties by enhancing the conviction presently before the court for which sentencing is occurring in the event there are "prior convictions." Section 60-6,197.02 is structured by first articulating the two different crimes for which there can be enhancement because of a "prior conviction." The first category of crime before the court for sentencing is found at "(i) For a violation of § 60-6,196," the DUI statute, and the second category of crime is found at "(ii) For a violation of § 60-6,197," the refusal statute. Hansen's "violation" for which she was being sentenced was in category (i), DUI, and in the statute after (i), there is a list of four convictions which can be a "prior conviction," beginning with "(A) Any conviction for a violation of section 60-6,196"; all four categories for prior conviction involve DUI—whether under Nebraska statute, a city or village ordinance, or the law of another state. And none of the four categories which can be a "prior conviction" involve in any way a previous conviction under § 60-6,197, the refusal statute.

After category "D," the statute's language is "or (ii) For a violation of section 60-6,197," the refusal statute, which the State uses to argue that a previous conviction for refusal can also be used as a prior conviction when the court is passing sentence under "(i) For a violation of section 60-6,196," the DUI statute. However, the "or" is in reference to the other crime for which there can be enhancing prior convictions—"a violation of section 60-6,197," the refusal statute. And again the same scheme is repeated in that three kinds of prior convictions—(A), (B), and (C)—are listed, but here the prior convictions are not for DUI-type crimes, but, rather, for refusal crimes under Nebraska statute, city or village ordinance, or another state's refusal statute that is equivalent to Nebraska's.

[5,6] In short, when a judge is sentencing for a violation of our DUI statute, the present offense can be enhanced by prior DUI convictions, and when a judge is sentencing for refusal, the

offense then before the court can be enhanced, but only by prior refusal convictions. But, as said by the county court, there is no "cross over" under the plain language of the statute because when sentencing for a DUI conviction, a previous refusal conviction is not in the list of convictions that are "prior convictions," and when sentencing for a refusal conviction, a previous DUI conviction is not in the list of "prior convictions" which can be used to enhance the refusal conviction. The State, citing *State v. Flye, supra*, argues that the rule of law applicable here is that we need only give the statutory language of § 60-6,197.02 its plain and ordinary meaning, and when the words of a statute are plain, direct, and unambiguous, no interpretation is necessary or will be indulged to ascertain meaning. We agree with the State's view of the applicable law concerning statutory interpretation. However, our plain reading of the statute is different than the State's. We cannot read the statute any differently than did the county court and the district court, given that Hansen was before the court for a DUI conviction, and the alleged "prior conviction" was a refusal conviction—but such is not within the statutorily listed "prior convictions" for a DUI conviction. Because the statute is clear, we do not resort to legislative history. Whether this is the result the Legislature intended is unknown, but the statute "says what it says." Accordingly, we affirm the decision of the lower courts.

AFFIRMED.

MARK R. HOLOUBEK AND WILLOW A. HOLOUBEK APPELLANTS,
v. PATRICIA K. ROMSHEK ET AL., APPELLEES.
749 N.W.2d 901

Filed May 20, 2008. No. A-06-1146.

1. **Equity: Appeal and Error.** In an appeal of an equitable action, the appellate court tries factual questions de novo on the record and reaches a conclusion independent of the findings of the trial court, provided, where credible evidence is in conflict on a material issue of fact, the appellate court considers and may give weight to the fact that the trial judge heard and observed the witnesses.
2. **Real Estate: Title: Words and Phrases.** A clear title means that the land is free from encumbrances.

3. ____: ____: ____. A good title is one free from litigation, palpable defects, and grave doubts, comprising both legal and equitable titles, and fairly deducible of record.
4. ____: ____: ____. A clear title means a good title, and a good title means a marketable or merchantable title.
5. **Real Estate: Contracts: Conveyances: Title.** A contract to convey in fee simple, clear of all encumbrances, implies a marketable title, and a marketable title is one of such character as assures to the purchaser the quiet and peaceable enjoyment of the property and one which is free from encumbrances.
6. **Real Estate: Vendor and Vendee: Title.** A merchantable title need not be free from every technical defect, but the test is whether a man of reasonable prudence, familiar with the facts and the questions of law involved, would, in the ordinary course of business, accept such a title as one which could be sold to a reasonable purchaser.
7. **Real Estate: Vendor and Vendee: Title: Words and Phrases.** The terms "marketable" and "merchantable" title are practically synonymous, and mean a title in which there is no doubt involved, either as to matter of law or fact, and a purchaser who contracts for a marketable title will not be required to take it if there is color of outstanding title and he may encounter the hazards of litigation.
8. **Real Estate: Vendor and Vendee: Title.** A purchaser of real estate cannot be made to buy a quiet title lawsuit.
9. **Contracts: Rescission.** An implied agreement to rescind a contract may be given effect.
10. **Equity: Rescission.** In equity, a lawsuit is not on rescission, but, rather, is for rescission, and thus it is a suit to have the court declare a rescission which is not accomplished in equity until the court so decrees.
11. ____: ____. When a court of equity grants rescission, its decree wipes out the instrument and renders it as though it does not exist.
12. **Rescission: Words and Phrases.** Rescission is the equitable relief that the court grants in the event of a breach of the warranty of marketable title.
13. **Rescission: Vendor and Vendee: Claims: Ratification: Estoppel.** A purchaser's claim for rescission can be defeated by conduct showing acquiescence, ratification, or estoppel.

Appeal from the District Court for Butler County: MARY C. GILBRIDE, Judge. Reversed and remanded with directions.

Stephen D. Mossman, of Mattson, Ricketts, Davies, Stewart & Calkins, for appellants.

James M. Egr, of Egr & Birkel, P.C., for appellees.

SIEVERS and MOORE, Judges.

SIEVERS, Judge.

Mark R. Holoubek and Willow A. Holoubek filed a complaint in the district court for Butler County seeking to rescind

their purchase of real estate from Patricia K. Romshek, Elsie Grubaugh, and Dick Grubaugh (collectively Grubaughs). After the closing of such sale, it came to light that the owners of the land to the south of the land purchased by the Holoubeks claimed the southernmost 27 feet of the Holoubeks' approximately 6.3-acre rectangular tract purchased from the Grubaughs. The evidence traces this "problem" to a scrivener's error in a deed filed on August 3, 1922. For efficiency, we will refer to this unusual circumstance as the "problem," and we will use 27 feet as a convenient generalization although the surveyed dimensions show that the measurement varies by a matter of a few feet, plus or minus. The district court denied rescission, and the Holoubeks have appealed.

FACTUAL BACKGROUND

On December 29, 2004, the Holoubeks agreed to buy, and the Grubaughs agreed to sell, real estate via a written contract which described the property as follows:

> Outlot 2 IN PT W ½ SW ¼ +/– 4.86 Acres West Addition, in Butler County, Nebraska.
>
> West Half of the Southwest Quarter (W ½ SW ¼) of Section 19, Township 15, North, Range 3, East of the 6th P.M., Butler County, NE. +/– 1.5 Acres West Addition.

The purchase price was $30,000, and closing was set for January 17, 2005. We quote portions of the contract which are crucial to the decision:

> **8. TITLE INSURANCE:** The Seller will order a Title Insurance Policy with the cost to be paid half by the Seller and half by the Buyer. The Seller will be given a reasonable time to correct any defects in the title.
>
> . . . .
>
> **11.REPRESENTATION BY SELLER.** The Seller makes the following representations and warranties to the Buyer, all of which survive the closing:
>
> (a) At the time of closing, the Seller will have good and clear marketable title to the property sold, assigned and conveyed hereunder, free and clear of all liens, charges, encumbrances and pledges.
>
> . . . .

> (c) Upon closing, no other persons or entities will have any interest in the property being conveyed hereunder, except as provided herein.
>
> . . . .
>
> (h) The legal description accurately and adequately reflects the property being conveyed.
>
> (i) That the foregoing representations and warranties are made by the Seller with the knowledge and expectation that the Buyer is placing reliance thereon.

The money was paid, and the sale was closed without incident.

The Holoubeks intended to subdivide the tract, and after the closing, for that purpose, they engaged the services of Richard Ronkar, who has been the Butler County surveyor for approximately 25 years. In the course of working with Ronkar, the Holoubeks first became aware of the "problem."

The "problem" involves the tract lying to the south of the Grubaugh property purchased by the Holoubeks. The two tracts are the same length, but the Holoubek tract is wider than the adjacent tract owned by Rick Lord and Debra Sypal. As explained by Ronkar, at least on paper, the Lord-Sypal tract overlaps approximately 27 feet to the north onto the Holoubek tract. The fact of such "overlap" was discerned by Ronkar, and he so advised the Holoubeks; the Grubaughs do not dispute this evidence in any way. The record is clear that it was not until after the Holoubeks began the platting process of the tract they had purchased from the Grubaughs that the Grubaughs and Holoubeks became aware of the "problem."

According to Ronkar's testimony, he did not advise the Holoubeks of what he already knew about the "problem" at the time that the Holoubeks engaged him on January 10, 2005, to do the preliminary plat for the subdivision. As we understand the testimony, Ronkar, in his work as county surveyor, had previously become aware of the "problem," albeit apparently not how or why it occurred. After being engaged by the Holoubeks, Ronkar undertook an investigation of the records and surveys to determine the origin of the "problem," and after he had done so, he then advised the Holoubeks of the overlap and why it had occurred. We note that Ronkar's testimony is clearer if read in conjunction with exhibit 44, his survey and field notes

filed with the Butler County clerk in the survey record repository on September 19, 2005. In any event, the first survey and plat was recorded on April 10, 1906 (for convenience, we deal with the widths of the tracts). Thus, as of such date, a 9.66-acre tract which was 647 feet wide was platted and recorded. On May 12, 1913, a deed was filed conveying the north 320 feet of the 9.66-acre tract; this is the tract that ultimately became the Grubaugh tract that was later sold to the Holoubeks. On March 16, 1915, a deed was filed conveying the south 327 feet of the 9.66-acre tract, and such deed describes that the tract extends south 327 feet to "'the north line of a public road.'" Thus, as of 1915, all 647 feet of the original tract is accounted for by these two conveyances.

Then, a third transaction occurred on September 8, 1919, when a survey and plat was recorded of "Hall's Addition" showing 27 feet of "parquet" on the north side of a public street, and from there, 12 lots 140 feet deep extended to the north—this represents the southernmost portion of the original tract. These three transactions constitute a division of the 647-foot-wide tract we started with, in that the southernmost 167 feet was platted as residential lots, Hall's Addition, leaving a tract 160 feet wide lying north thereof (ultimately the Lord-Sypal tract), and then to the north of that tract, a tract 320 feet wide (the Grubaugh tract).

We quote extensively from Ronkar's field notes, Nos. 6 through 8 from exhibit 44, which explain the inception of the "problem," whereby the land lying to the south of what the Holoubeks bought from the Grubaughs was expanded from its actual width of 160 feet to what the title record presently shows as a tract that is 187 feet wide. Thus, stated simply, on paper, there is a piece of ground approximately 27 feet by 650 feet, but in reality, it does not exist. Ronkar's field notes state:

> 6) 8-3-1922; Deed filed in Deed Bk. 62 p.281, conveying 187′, more or less, lying north of the Hall's Addition lots. In my opinion, this deed description contains an error. I believe the person who wrote this description properly used the 327′ figure from [field note No. 4, the March 16, 1915, deed], and then subtracted the 140′ deep lots, to equal 187′ remaining, when the correct computation

> should have been the 327′ figure, less 27′ Parquet, less the 140′ deep lots, to equal 160′. This deed description begins 320′ south of the south line of the F.E. & M.V. Railroad.
>
> 7) June 1975; Survey plat by Erickson of this subject property, shows he established monuments on the south line of this subject property, 187′ north of the north line of Hall's Addition. This appears to be a perpetuation of the previous, erroneous deed description. Erickson's plat note states that the description "includes all of that real estate conveyed in deeds recorded in Book 92, pages 555 and 556". I believe that note is also in error, as said deed description calls for the 320′, along with a 100′ strip of abandoned railroad, equaling a total of 420′. Erickson's plat shows the east line of this subject property as being only 394.24′ wide, a difference of 25.76′.
>
> 8) Nov. 1977; Survey plat by Erickson of the parcel lying south of the subject property, shows said parcel [Lord-Sypal tract] having a width of 187′, again perpetuating the previous, erroneous deed description.

Ronkar concludes his field notes by stating that "[t]he conflict over the strip of land along the south line could not be resolved by the adjacent owners [the Holoubeks and Lord and Sypal], and this survey was abandoned, as directed by [Mark] Holoubek." Ronkar explained that in his opinion, the writer of the deed in 1922 missed the 27 feet "parquet" of the street, which was adjacent to the south edge of Hall's Addition, and that such error was thereafter perpetuated by 1975 and 1977 surveys, resulting in the Lord-Sypal tract being approximately 27 feet wider (on paper) than it should be. The error has the effect of adding 27 feet to the north edge of the Lord-Sypal tract—27 feet which does not exist.

Given our resolution, we need not exquisitely detail the Holoubeks' attempts to resolve the "problem." However, the long and short of it was that Lord and Sypal rejected the Holoubeks' offer of 13½ feet of the "problem" strip in settlement of the "problem." The Holoubeks abandoned their subdivision plan and filed this lawsuit for rescission of the contract and deed, repayment of their $30,000 purchase price, plus some $6,308.10 in expenditures to develop the tract.

TRIAL COURT DECISION

The trial court determined that rescission was not available in this case, citing the following facts and circumstances: The agreement did not contain an express rescission clause, the Holoubeks were the drafters of the agreement and were familiar with the land, the Holoubeks did not have the property surveyed until after closing, the Grubaughs were unaware until after closing of any claim of the landholders to the south, the Grubaughs never committed any fraud, it is the deed to the Lord-Sypal property which is in error, and there was no mistake in the deed given to the Holoubeks. The district court made three additional findings, which we will delineate and discuss further in the analysis section of our opinion.

ASSIGNMENTS OF ERROR

The Holoubeks set forth 11 assignments of error. Summarized and restated, the assignments of error are that the district court erred (1) in failing to find that the Grubaughs breached the agreement by failing to provide a good and clear marketable property and by failing to ensure that no other person would claim an interest in the property conveyed; (2) in failing to find negligent misrepresentation by the Grubaughs that they were providing good and clear marketable title and that no other person would claim any interest in the property; (3) in failing to rescind the agreement and warranty deed for either breach of the agreement or negligent misrepresentation; (4) in finding that the boundary dispute did not make the property uninhabitable for all practical purposes; (5) in finding that the Holoubeks did not give the Grubaughs a reasonable time to cure the defect; (6) in finding that the Holoubeks acquiesced in or ratified the agreement by attempting to settle the issue with Lord and Sypal and by agreeing to a settlement offer which would give up a portion of the property; and (7) in failing to award damages, including interest.

STANDARD OF REVIEW

[1] In an appeal of an equitable action, the appellate court tries factual questions de novo on the record and reaches a conclusion independent of the findings of the trial court,

provided, where credible evidence is in conflict on a material issue of fact, the appellate court considers and may give weight to the fact that the trial judge heard and observed the witnesses. *Bauermeister v. McReynolds*, 253 Neb. 554, 571 N.W.2d 79 (1997).

ANALYSIS

Introduction.

At the outset, we note that in the pleadings and the Holoubeks' pretrial statement of issues, the Holoubeks raised issues of negligent misrepresentation. We also note that the Grubaughs in their appellees' brief before this court, under the guise of examining all of the circumstances surrounding the purchase, seem to frame the matter in language of fault or blame. For example, the Grubaughs' brief states:

> [Mark] Holoubek is what people call a "wheeler dealer" and needed to move things along to make a quick buck. The record is filled with Mark Holoubek[']s touting his background. The problem is Mark Holoubek wanted to be his own lawyer, his own real estate broker, and his own developer and cut corners for a quick buck. Equity does not allow someone to benefit from [his] own mistakes and errors. Remember Holoubek did not have the Tract surveyed until AFTER closing . . . . No experienced developer and land purchaser goes forward without a survey, goes forward without knowing the zoning regulations, goes forward to close until ALL matters are examined before closing and DOES provide for those contingencies. Holoubek did none of these things with the purchase.

Brief for appellees at 11-12.

As pointed out above, in our section entitled "Trial Court Decision," the trial court likewise found some of such concepts advanced by the Grubaughs significant. For example, the "Order of Dismissal Following Trial" notes that the purchase agreement did not contain an express rescission clause and that the Holoubeks drafted the agreement, were familiar with the land, and chose not to have it surveyed until after closing. However, in our view, the initial analytical focus must be on two key provisions of the "Agreement for the Sale of Real Estate" entered

into by the parties on December 29, 2004, because the analytical calculus for the case must reflect that this is essentially a breach of contract claim. Therefore, our analytical approach to the case is different from that of the district court.

Marketable Title.

In paragraph 11 of the agreement, the Grubaughs represented and warranted to the Holoubeks that "(a) [at] the time of closing, the Seller will have good and clear marketable title to the property" and that "(c) . . . no other persons or entities will have any interest in the property being conveyed." Therefore, these contractual provisions form the first key point of analysis.

[2-7] The first crucial question is what the term "marketable title" means. Initially, we note that the case law makes it clear marketable title and merchantable title are synonymous and that the terms are sometimes used interchangeably. We quote at length from the thorough exposition of the concept of marketable title by the Nebraska Supreme Court in *Bliss v. Schlund*, 123 Neb. 253, 257-58, 242 N.W. 436, 438 (1932):

> "A clear title means that the land is free from [e]ncumbrances. *Roberts v. Bassett,* 105 Mass. 409. A good title is one free from litigation, palpable defects and grave doubts, comprising both legal and equitable titles, and fairly deducible of record. *Turner v. McDonald,* 76 Cal. 177, 9 Am. St. Rep. 189, 18 Pac. 262; *Reynolds v. Borel,* 86 Cal. 538, 25 Pac. 67. A clear title means a good title (*Oakey v. Cook,* 41 N. J. Eq. 350, 7 Atl. 495), and a good title means a marketable or merchantable title (*Irving v. Campbell,* 121 N. Y. 353, 8 L. R. A. 620, 24 N. E. 821). A contract to convey in fee simple, clear of all [e]ncumbrances, implies a marketable title (*Bell v. Stadler,* 31 Idaho, 568, 174 Pac. 129), and a marketable title is one of such character as assures to the purchaser the quiet and peaceable enjoyment of the property and one which is free from [e]ncumbrances (*Barnard v. Brown,* 112 Mich. 452, 67 Am. St. Rep. 432, 70 N. W. 1038)." *Ogg v. Herman,* 71 Mont. 10.
>
> It has been held that a merchantable title need not be free from every technical defect, but the test is whether

> a man of reasonable prudence, familiar with the facts and the questions of law involved, would, in the ordinary course of business, accept such a title as one which could be sold to a reasonable purchaser. *Cappel v. Potts,* 192 Ia. 661.
>
> The terms "marketable" and "merchantable" title are practically synonymous, and mean a title in which there is no doubt involved, either as to matter of law or fact, and a purchaser who contracts for a marketable title will not be required to take it if there be color of outstanding title and he may encounter the hazards of litigation. *Hess v. Bowen,* 237 Fed. 510; *Eaton v. Blackburn,* 49 Or. 22; *Dalzell v. Crawford,* 1 Pars. Eq. Cas. (Pa.) 37, 45; *Herman v. Somers,* 158 Pa. St. 424, 38 Am. St. Rep. 851; *Ormsby v. Graham,* 123 Ia. 202.

[8] *Bliss v. Schlund, supra*, was followed in *Northouse v. Torstenson*, 146 Neb. 187, 19 N.W.2d 34 (1945). In *Northouse*, the trial court found that the plaintiff had not tendered an abstract of title reflecting a merchantable title. The Nebraska Supreme Court affirmed, saying:

> It appears to this court that no other judgment is possible under the law and the facts, for a purchaser cannot be made to buy a lawsuit in such a case, even if he might win in the end. A title to real estate, to be good, satisfactory or marketable, should be free from reasonable doubt, either in law or in fact. The judgment of the district court is affirmed.

Northouse v. Torstenson, 146 Neb. at 192-93, 19 N.W.2d at 36-37.

Recalling the facts that we have recited in considerable detail about the approximately 27- by 650-foot strip on the south edge of the Grubaugh property to which Lord and Sypal make claim by virtue of their deed, which perpetuates a scrivener's error from 1922, we find that no judgment is possible under the facts of this case, other than to conclude that at the time of closing, and as well as at trial, remembering the express proviso of the contract that the warranty of marketable title survives the closing, the Grubaughs did not have, nor did they convey to the Holoubeks, marketable title. Quite clearly, unless the Grubaughs are held to their representation and warranty to

convey marketable title, the Holoubeks are buying a quiet title lawsuit to resolve what we have nicknamed the "problem." And, as *Northouse v. Torstenson, supra*, points out, the fact that the Holoubeks might prevail over Lord and Sypal, a matter upon which we neither express nor imply any opinion, is simply not material to the question of whether the Grubaughs had and conveyed marketable title. Without rescission, we would be forcing the Holoubeks to "buy a lawsuit." There is obviously reasonable doubt in law and in fact about the title to the Grubaugh property, and a reasonably prudent purchaser, well informed as to the facts and their legal consequences as outlined by Ronkar, would not accept such title under the warranty of marketable title contained in the contract.

Finally, although the evidence is undisputed that at the time of closing, no one, including Lord and Sypal, was aware of his or her potential claim to a portion of the Grubaugh tract, the Grubaughs did warrant that "no other persons . . . will have any interest in the property being conveyed," and such provision also survived the closing. The record indisputably shows that Lord and Sypal have resisted all attempts, first by the Holoubeks and then by the Grubaughs, to amicably resolve the "problem." Thus, the foregoing quoted provision from paragraph 11(c) of the purchase agreement has clearly been breached. In short, at least on the record before us, it is quite apparent that the Lord-Sypal claim cannot be resolved without further litigation.

[9-12] We now turn to several of the trial court's reasons for denying rescission. The trial court cites, apparently as a circumstance supporting the denial of rescission, the fact that "[t]he Purchase Agreement does not contain an express rescission clause." However, the law is clear that an implied agreement to rescind a contract may be given effect. *Lustgarten v. Jones*, 220 Neb. 585, 371 N.W.2d 668 (1985); *Davco Realty Co. v. Picnic Foods, Inc.*, 198 Neb. 193, 252 N.W.2d 142 (1977). Clearly, a warranty of marketable title, meaning that the facts or law do not put the title in doubt, would be worthless if such did not carry with it the implied remedy of rescission. In this regard, it is important that in equity, the lawsuit is not *on* rescission, but, rather, is *for* rescission, and thus it is a suit to have the

court declare a rescission which is not accomplished in equity until the court so decrees. See *Kracl v. Loseke*, 236 Neb. 290, 461 N.W.2d 67 (1990), citing Dan B. Dobbs, Handbook on the Law of Remedies, Principles of Restitution § 4.8 (1973). *Kracl v. Loseke, supra*, further illuminates the equitable remedy of rescission, stating that when a court of equity grants rescission, its decree wipes out the instrument and renders it as though it does not exist. Accordingly, the fact that the agreement between the Grubaughs and the Holoubeks did not contain an express provision for rescission is of no moment, because such remedy is implied from and inherent in the warranty of marketable title, and rescission is the equitable relief that the court grants in the event of a breach of the warranty of marketable title.

We now turn to a specific finding of the trial court which is apparently a material part of the trial court's rationale in denying the Holoubeks relief: "The fact that the neighbors to the south make a claim to the southern 27 feet of the Tract does not defeat the object of the parties in making the agreement, and does not render the Tract bargained for uninhabitable for all practical purposes." This proposition, according to the trial judge's order, is derived from *Eliker v. Chief Indus.*, 243 Neb. 275, 498 N.W.2d 564 (1993). However, examination of *Eliker* reveals that it is a completely different kind of case and that the doctrine found therein, and relied upon by the trial court here, is simply inapplicable to the instant case. *Eliker* involved an action brought to obtain rescission of a home construction contract, and the issue presented was whether the homeowners' remedy for defects in the home was in damages or equitable rescission. The contractor argued that damages would be an adequate remedy, but the *Eliker* court pointed out that in instances of failure of consideration, such is not generally a sufficient ground for equitable cancellation of a contract, but equitable cancellation, i.e., rescission, may arise from a breach of contract which is so substantial and fundamental as to defeat the object of the parties entering into the contract.

The *Eliker* court said:

> Although [the contractor] asserts that the proper remedy for breach of a construction contract is damages rather than rescission, the existing case law does not preclude

> the application of an equitable remedy where a breach of the contract is so substantial that it defeats the object of the parties in entering into the agreement.

243 Neb. at 279, 498 N.W.2d at 567. The court further explained that a damage remedy contemplates that the contract has been substantially complied with and will serve substantially as well as would the structure if completed according to the contract and completion would not endanger the balance of the structure. The court, after reciting an extensive list of what would be needed to complete the house and make the repairs, said that "it is clear that the structure, as completed, does not serve the same purpose as it would have if completed according to the contract" and that "the variations between the house that the [homeowners] bargained for and the structure as completed were egregious." *Id.* at 281, 498 N.W.2d at 568.

It was in this context that the *Eliker* court held that "rescission is the proper remedy where a breach of contract is so substantial and fundamental as to defeat the object of the parties in making the agreement, so that it leaves the property bargained for uninhabitable for all practical purposes." 243 Neb. at 285, 498 N.W.2d at 570.

Eliker did not involve a claim of a breach of a warranty of marketable title, but, rather, a breach of contract for the construction of a house, which even the contractor admitted had a flawed design and substandard workmanship causing it to effectively split in half. Thus, in *Eliker*, the choice was between remedies for an obvious breach of a home construction contract, whereas this action seeks equitable rescission because of a breach of the warranty of marketable title. As a result, this rationale for denying rescission expressed by the district court, citing a clearly distinguishable case, is incorrect.

The district court also reasoned as follows:

> Even if the existence of the Disputed Area was considered a "defect" in title, [the Holoubeks] failed to allow [the Grubaughs] a reasonable time to cure the defect. [The Grubaughs] acted reasonably in attempting to resolve the issues when requested by [the Holoubeks] to do so. [The Holoubeks] brought this suit before a reasonable time had

> elapsed. The "defect" is one which could be cured if a reasonable time were allowed.

The trial court's opinion reveals that this rationale is derived from *Fritsch v. Hilton Land & Cattle Co.*, 245 Neb. 469, 513 N.W.2d 534 (1994), as well as our discussion of *Fritsch* in *Snowdon Farms v. Jones*, 8 Neb. App. 445, 595 N.W.2d 270 (1999).

Snowdon Farms v. Jones, supra, is the opposite of the instant case, because the seller was attempting to use a title defect as a defense to the buyer's action for specific performance. We reversed the district court's order allowing the seller to rescind, finding that the district court's earlier journal entry had cured the main defect and that given the law's preference for specific performance, the buyer's motion for summary judgment had to be reconsidered. Of considerable note in *Snowdon Farms* is the fact that after the contract, and while the seller was purportedly attempting to cure the title defect, the land became more interesting and perhaps more valuable because a third party was harvesting topsoil from it. In *Fritsch v. Hilton Land & Cattle Co., supra*, the seller knew of a mortgage-related defect at the time of the agreement in 1981, but did nothing about it until 1984. As a result, the Nebraska Supreme Court found that there was a failure to cure the defect within a reasonable time and that thus, the seller could no longer insist upon performance by the buyer. The fact is, in this case, that neither the Holoubeks nor the Grubaughs were able to make any progress with Lord and Sypal to resolve the "problem." Moreover, the obvious remedy is a quiet title action, but there is no evidence that the Grubaughs ever instituted such. At oral argument, the Grubaughs' counsel asserted that they could not do so, because the Holoubeks had recorded the deed—implying a lack of standing. We need not decide whether the Grubaughs would have lacked standing, despite their contractual obligation, because any number of solutions to that potential issue would be easily apparent to a seller intent on fixing the "problem." And, the evidence is not convincing that the Grubaughs were seriously intent on resolving the "problem." In other words, lack of time to cure was not the issue.

Accordingly, the two cases relied upon by the district court are factually distinguishable. Moreover, of significant import is

the fact that in their answer, the Grubaughs make no assertion that they were not allowed a reasonable time to cure the defect. Moreover, the trial court's decision implies that there was insufficient time—from awareness of the "problem" to the time of trial—for a quiet title action involving Lord and Sypal to be filed, but any such implied conclusion is obviously incorrect.

[13] The final rationale of the district court for denying rescission is that "[the Holoubeks], in essence, acquiesced in or ratified the contract by attempting to settle the issue with the neighbors and by agreeing to make a settlement offer which would give up a portion of the property." The trial court's foundation for this rationale is *Kracl v. Loseke*, 236 Neb. 290, 461 N.W.2d 67 (1990), a case in which the purchasers (Kracls) of real property sought rescission of the written contract based on the concealment by the sellers (Losekes) of substantial termite damage in the residence. The trial court rescinded the contract, and the Nebraska Supreme Court affirmed. Losekes argued that the right to rescind was waived by Kracls because they made improvements to the house. The Supreme Court acknowledged that a purchaser's claim for rescission can be defeated by conduct showing acquiescence, ratification, or estoppel, citing a Maryland case, *Wolin v. Zenith Homes, Inc.*, 219 Md. 242, 146 A.2d 197 (1959). The court recited four minor repairs made by Kracls totaling $93.88 made after discovery of the termite damage, and the court said that such repairs could hardly be considered acts which indicated Kracls' intent to ratify the contract with Losekes or acquiesce in the purchase of the house with the undisclosed termite damage.

The fact that the Holoubeks attempted to work with Lord and Sypal to arrive at an accommodation to allow them to proceed with the planned subdivision is by no means acquiescence to the notion that if Lord and Sypal tell the Holoubeks to "go fly a kite," they, as buyers holding a warranty of marketable title, are somehow agreeing that they will take on the responsibility and cost of a quiet title action, which obviously looms if Lord and Sypal reject the Holoubeks' offer—as they did. Moreover, the district court's rationale is fundamentally at odds with our public policy favoring compromise of disputes. See *Baker v. Blue Ridge Ins. Co.*, 215 Neb. 111, 337 N.W.2d 411 (1983).

CONCLUSION

For the foregoing reasons, we reverse the decision of the district court and remand the matter to the district court for entry of an order rescinding the agreement for sale of real estate between the parties executed December 29, 2004. Because the purpose of rescission is to place the parties in status quo, that is, to return them to their position which existed before the rescinded contract, see *Kracl v. Loseke, supra*, the district court shall consider the Holoubeks' claims for damages upon the record previously made.

REVERSED AND REMANDED WITH DIRECTIONS.

IRWIN, Judge, participating on briefs.

JOHN C. CLARK, APPELLANT AND CROSS-APPELLEE, V. LES TYRRELL, DIRECTOR OF THE STATE REAL ESTATE COMMISSION, AND THE STATE OF NEBRASKA EX REL. STATE REAL ESTATE COMMISSION, APPELLEES AND CROSS-APPELLANTS.

750 N.W.2d 364

Filed May 20, 2008. No. A-07-231.

1. **Administrative Law: Real Estate: Final Orders: Appeal and Error.** Final orders of the State Real Estate Commission are appealed in accordance with the Administrative Procedure Act.
2. **Administrative Law: Final Orders: Courts: Appeal and Error.** In reviewing final administrative orders under the Administrative Procedure Act, the district court functions not as a trial court but as an intermediate court of appeals.
3. **Administrative Law: Appeal and Error.** In an appeal under Neb. Rev. Stat. § 84-917(5)(a) (Cum. Supp. 2006), the district court conducts a de novo review of the record of the agency.
4. **Administrative Law: Courts: Appeal and Error.** In a de novo review by a district court of the decision of an administrative agency, the level of discipline imposed by the agency is subject to the district court's power to affirm, reverse, or modify the decision of the agency or to remand the case for further proceedings.
5. **Administrative Law: Judgments: Appeal and Error.** A judgment or final order rendered by a district court in a judicial review pursuant to the Administrative Procedure Act may be reversed, vacated, or modified by an appellate court for errors appearing on the record.
6. ____: ____: ____. When reviewing an order of a district court under the Administrative Procedure Act for errors appearing on the record, the inquiry is whether the decision conforms to the law, is supported by competent evidence, and is not arbitrary, capricious, or unreasonable.

7. **Judgments: Appeal and Error.** Whether a decision conforms to law is by definition a question of law, in connection with which an appellate court reaches a conclusion independent of that reached by the lower court.
8. **Criminal Law: Double Jeopardy.** The Double Jeopardy Clause of the Fifth Amendment to the U.S. Constitution protects against three distinct abuses: (1) a second prosecution for the same offense after acquittal, (2) a second prosecution for the same offense after conviction, and (3) multiple punishments for the same offense.
9. **Constitutional Law: Double Jeopardy.** The protection provided by Nebraska's double jeopardy clause is coextensive with that provided by the U.S. Constitution.
10. **Statutes: Words and Phrases.** A penal statute is one by which a forfeiture is imposed for transgressing the provisions of the act and where the extent of liability imposed is not measured or limited by the damage caused by the act or omission.
11. **Double Jeopardy: Legislature: Intent: Appeal and Error.** In analyzing whether a penalty or sanction constitutes punishment for purposes of double jeopardy, an appellate court must inquire (1) whether the Legislature intended the statutory sanction to be criminal or civil and (2) whether the statutory sanction is so punitive in purpose or effect as to transform what was clearly intended as a civil sanction into a criminal one.
12. **Statutes: Legislature: Intent.** Whether the Legislature intended a civil or criminal sanction is simply a matter of statutory construction.
13. **Statutes: Legislature: Intent: Proof.** Once a determination is made that a sanction was intended to be civil in nature, a court will reject the Legislature's manifest intent only where a party challenging the statute provides the clearest proof that the statutory scheme is so punitive in either purpose or effect as to negate the State's intention.
14. **Statutes: Legislature: Intent.** In analyzing whether the purpose or effect of a civil sanction statute is so punitive as to negate the Legislature's intent, the following factors are considered: (1) whether the sanction involves an affirmative disability or restraint, (2) whether it has historically been regarded as a punishment, (3) whether it comes into play only on a finding of scienter, (4) whether its operation will promote the traditional aims of punishment—retribution and deterrence, (5) whether the behavior to which it applies is already a crime, (6) whether an alternative purpose to which it may rationally be connected is assignable for it, and (7) whether it appears excessive in relation to the alternative purpose assigned.
15. ____: ____: ____. In analyzing whether the purpose or effect of a civil sanction statute is so punitive as to negate the Legislature's intent, the factors must be considered in relation to the statute on its face and are helpful, but are neither exhaustive nor dispositive.
16. **Double Jeopardy.** The Double Jeopardy Clause protects against only multiple criminal punishments or prosecutions.
17. **Double Jeopardy: Licenses and Permits: Revocation.** The State can discipline and regulate professionals, including suspending the privilege to practice, without running afoul of the Double Jeopardy Clause.
18. ____: ____: ____. The revocation or suspension of a professional license generally does not constitute punishment for the purposes of double jeopardy

analysis, but, rather, serves the remedial purpose of protecting the public from unfit practitioners.

19. **Administrative Law: Due Process: Notice: Evidence.** In proceedings before an administrative agency or tribunal, procedural due process requires notice, identification of the accuser, factual basis for the accusation, reasonable time and opportunity to present evidence concerning the accusation, and a hearing before an impartial board.
20. **Constitutional Law: Courts: Jurisdiction: Statutes.** The Nebraska Court of Appeals cannot determine the constitutionality of a statute, yet when necessary to a decision in the case before it, the court does have jurisdiction to determine whether a constitutional question has been properly raised.
21. **Constitutional Law: Rules of the Supreme Court: Statutes: Appeal and Error.** To properly raise a challenge to the constitutionality of a statute, a litigant is required to strictly comply with Neb. Ct. R. of Prac. 9E (rev. 2006) and to properly raise and preserve the issue before the trial court.
22. **Constitutional Law: Appeal and Error.** A constitutional issue not presented to or passed upon by the trial court is not appropriate for consideration on appeal.
23. **Supersedeas Bonds: Appeal and Error.** The trial court may in its discretion grant supersedeas in cases not specified in Neb. Rev. Stat. § 25-1916 (Cum. Supp. 2006). An allowance of supersedeas in such a case may be granted in such an amount and on such conditions as the court determines necessary for the protection of the parties.

Appeal from the District Court for Lancaster County: KAREN B. FLOWERS, Judge. Affirmed.

Robert R. Otte, of Morrow, Poppe, Otte & Watermeier, P.C., L.L.O., for appellant.

Adam J. Prochaska and, on brief, Neal E. Stenberg, of Harding & Schultz, P.C., L.L.O., for appellees.

SIEVERS, MOORE, and CASSEL, Judges.

MOORE, Judge.

INTRODUCTION

John C. Clark appeals from a decision of the district court for Lancaster County affirming the suspension of John's real estate broker's license by Nebraska's State Real Estate Commission (NREC). Les Tyrrell, director of the NREC, and the "State of Nebraska ex rel. State Real Estate Commission" (collectively the State) have cross-appealed. Because the district court's decision conforms to the law, is supported by competent evidence, and is not arbitrary, capricious, or unreasonable, we affirm.

BACKGROUND

The record shows that John holds a real estate broker's license in both Nebraska and Iowa and is the designated broker for Why USA Independent Brokers Realty (Why USA), a licensed real estate firm in Omaha, Nebraska. Among the real estate agents affiliated with John is his son, David Clark, who is licensed as a real estate agent only in Nebraska.

In January or February 2004, Rex and/or Diane Terry called Why USA and spoke to David about their interest in buying a house within a 50-mile radius of Bellevue, Nebraska. The Terrys asked David to help them in locating such a house, and David identified various houses in Omaha and showed them to the Terrys. The Terrys were also conducting their own research and located a house they wanted to see in Carter Lake, Iowa. The Terrys called David, who agreed to show them the property. It was not until sometime after David and the Terrys arrived at the property that David realized the house was in Iowa and that he was not licensed to show it to them or provide them with assistance in purchasing it.

David spoke with John about the Terrys' interest in the Carter Lake property, and together, David and John determined that if the Terrys pursued their interest, John would be "the essential Realtor of record." The Terrys later called David and told him they were considering making an offer on the Carter Lake house and asked to see it again. David met them at the property and brought with him a standard real estate purchase agreement. David discussed an offer with the Terrys and completed the offer form with them, which the Terrys signed. David then returned to the Why USA offices, where, at some point, John signed the offer as a witness and as an agent. David communicated the offer to the sellers, who made a counteroffer. David communicated the counteroffer to the Terrys, who accepted it. David then performed whatever tasks remained for a buyer's agent to do with respect to closing on the Carter Lake property.

Because of problems that occurred later, which are not relevant to this proceeding, it came to the attention of the real estate commissions in both Iowa and Nebraska that David had represented a buyer with respect to a sale in Iowa without the requisite license and that John, his broker, had permitted, if not

facilitated, his doing so. John admitted wrongdoing before the Iowa Real Estate Commission (IREC) and paid a fine.

In July 2005, the NREC initiated proceedings against John, alleging that John had violated Neb. Rev. Stat. § 81-885.24(22) and (29) (Reissue 2003) in various regards. A hearing was held before the NREC on January 18, 2006. The NREC determined that John demonstrated unworthiness to act as a broker in violation of § 81-885.24(29). The penalty phase occurred immediately thereafter, and we have set forth relevant details of what occurred during the penalty phase of the hearing in the analysis section below. The NREC ordered that John's license be suspended for 2 years, all but 60 days of which suspension were to be served on probation. The NREC also ordered that within 1 year, John complete certain continuing education requirements in addition to the usual mandatory continuing education requirements for brokers. John appealed the decision of the NREC to the district court.

On January 30, 2007, the district court entered an order ruling on John's appeal. In considering the NREC's finding of a violation of § 81-885.24(29), the court determined that John's wrongdoing was something more than a simple failure to adequately supervise David. The court found that John knowingly aided David in violating the licensing regulations by representing himself to be the Terrys' agent when, in fact, he was not. The court found that John's actions evidenced a blatant disregard for the rules of his profession and clearly demonstrated unworthiness to act as a broker.

The district court rejected John's argument that because he had already been disciplined in Iowa, subjecting him to discipline in Nebraska constituted double jeopardy. The court found that the present proceeding was not a criminal proceeding and that John had not been subjected to any criminal penalties.

In considering John's argument that the NREC had used his prior disciplinary history to enhance the discipline imposed in this case, the district court noted the process that had been followed by the NREC during the penalty phase of the hearing and set forth the disciplinary history revealed by the record. The court noted that John does not argue that the information brought forth in the hearing before the NREC was incorrect.

The court determined that John was not given an enhanced penalty by the NREC, noting that the discipline imposed was well within the range of sanctions permissible by statute. The court determined that the NREC would have been remiss in deciding what sanction, within the permissible range of sanctions, to impose if it had not first looked at John's disciplinary history. The court disagreed with John's suggestion that the due process applicable to criminal sentencing should be applied to civil penalties such as this one. Finally, the court determined that the sanction imposed was not excessive.

On February 28, 2007, John filed notice of his intent to appeal the district court's decision to this court. Also on that date, John filed a motion in the district court seeking a stay of execution, during the pendency of his appeal to this court, of the sanctions imposed by the NREC. John also requested that the district court set the amount of any necessary supersedeas bond. In an order entered on April 5, the court found that the motion fell within the court's discretionary power to grant or deny and granted the motion. The court set the supersedeas bond in the amount of $275. The State takes issue with the court's grant of a stay and has accordingly perfected a cross-appeal to this court.

ASSIGNMENTS OF ERROR

John asserts that the district court erred by (1) concluding that John's discipline by the NREC did not violate double jeopardy in light of the discipline imposed by the IREC, (2) deciding that the NREC's consideration of John's prior disciplinary record before the NREC did not violate due process, (3) finding that John's conduct constituted unworthiness to act as a broker, and (4) determining that the level of discipline imposed by the NREC was not excessive.

On cross-appeal, the State asserts, consolidated and restated, that the district court erred by ordering a stay of execution, pending resolution of this appeal, of the discipline imposed against John.

STANDARD OF REVIEW

[1-4] Final orders of the NREC are appealed in accordance with the Administrative Procedure Act. See Neb. Rev. Stat.

§ 81-885.30 (Reissue 2003). In reviewing final administrative orders under the Administrative Procedure Act, the district court functions not as a trial court but as an intermediate court of appeals. *Betterman v. Department of Motor Vehicles*, 273 Neb. 178, 728 N.W.2d 570 (2007). In an appeal under Neb. Rev. Stat. § 84-917(5)(a) (Cum. Supp. 2006), the district court conducts a de novo review of the record of the agency. *Tyson Fresh Meats v. State*, 270 Neb. 535, 704 N.W.2d 788 (2005). In a de novo review by a district court of the decision of an administrative agency, the level of discipline imposed by the agency is subject to the district court's power to affirm, reverse, or modify the decision of the agency or to remand the case for further proceedings. *Rainbolt v. State*, 250 Neb. 567, 550 N.W.2d 341 (1996).

[5-7] A judgment or final order rendered by a district court in a judicial review pursuant to the Administrative Procedure Act may be reversed, vacated, or modified by an appellate court for errors appearing on the record. *Thorson v. Nebraska Dept. of Health & Human Servs.*, 274 Neb. 322, 740 N.W.2d 27 (2007). When reviewing an order of a district court under the Administrative Procedure Act for errors appearing on the record, the inquiry is whether the decision conforms to the law, is supported by competent evidence, and is not arbitrary, capricious, or unreasonable. *Id.* Whether a decision conforms to law is by definition a question of law, in connection with which an appellate court reaches a conclusion independent of that reached by the lower court. *Id.*

ANALYSIS

Double Jeopardy.

[8,9] John asserts that the district court erred by concluding that John's discipline by the NREC did not violate double jeopardy in light of the discipline imposed by the IREC. The Double Jeopardy Clause of the Fifth Amendment to the U.S. Constitution protects against three distinct abuses: (1) a second prosecution for the same offense after acquittal, (2) a second prosecution for the same offense after conviction, and (3) multiple punishments for the same offense. *State v. Miner*, 273 Neb. 837, 733 N.W.2d 891 (2007). The protection provided

by Nebraska's double jeopardy clause is coextensive with that provided by the U.S. Constitution. *Id.* The question in this case is whether John has received multiple punishments for the same offense.

[10] John relies on the fact that the Nebraska Supreme Court has determined that § 81-885.24 is penal in nature and must be strictly construed. See *Hancock v. State ex rel. Real Estate Comm.*, 213 Neb. 807, 331 N.W.2d 526 (1983). A penal statute is one by which a forfeiture is imposed for transgressing the provisions of the act and where the extent of liability imposed is not measured or limited by the damage caused by the act or omission. *Id.* A determination that a statute is penal in nature, however, is not dispositive of the question of whether the penalty contemplated by the statute constitutes punishment for purposes of double jeopardy.

[11-16] In analyzing whether a penalty or sanction constitutes punishment for purposes of double jeopardy, an appellate court must inquire (1) whether the Legislature intended the statutory sanction to be criminal or civil and (2) whether the statutory sanction is so punitive in purpose or effect as to transform what was clearly intended as a civil sanction into a criminal one. See *State v. Isham*, 261 Neb. 690, 625 N.W.2d 511 (2001). Whether the Legislature intended a civil or criminal sanction is simply a matter of statutory construction. *Id.* Once a determination is made that a sanction was intended to be civil in nature, a court will reject the Legislature's manifest intent only where a party challenging the statute provides the clearest proof that the statutory scheme is so punitive in either purpose or effect as to negate the State's intention. *Id*. In analyzing whether the purpose or effect of a civil sanction statute is so punitive as to negate the Legislature's intent, the following factors are considered: (1) whether the sanction involves an affirmative disability or restraint, (2) whether it has historically been regarded as a punishment, (3) whether it comes into play only on a finding of scienter, (4) whether its operation will promote the traditional aims of punishment—retribution and deterrence, (5) whether the behavior to which it applies is already a crime, (6) whether an alternative purpose to which it may rationally be connected is assignable for it, and (7) whether it appears excessive in

relation to the alternative purpose assigned. *Id.* In analyzing whether the purpose or effect of a civil sanction statute is so punitive as to negate the Legislature's intent, the factors must be considered in relation to the statute on its face and are helpful, but are neither exhaustive nor dispositive. *Id.* The Double Jeopardy Clause protects against only multiple criminal punishments or prosecutions. *Id.*

John was disciplined under § 81-885.24, which provides:

> The commission may, upon its own motion, and shall, upon the sworn complaint in writing of any person, investigate the actions of any broker, associate broker, salesperson, or subdivider and may censure the licensee or certificate holder, revoke or suspend any license or certificate issued under the Nebraska Real Estate License Act, or enter into consent orders, whenever the license or certificate has been obtained by false or fraudulent representation or the licensee or certificate holder has been found guilty of any of the [enumerated] unfair trade practices[.]

The NREC found John guilty of violating § 81-885.24(29), that is, "[d]emonstrating negligence, incompetency, or unworthiness to act as a broker, associate broker, or salesperson, whether of the same or of a different character as otherwise specified in this section."

[17,18] The district court determined that double jeopardy has no application in this case, and we agree. The Nebraska Supreme Court has determined that the revocation or suspension of a professional license generally does not constitute punishment for the purposes of double jeopardy analysis. *State v. Wolf*, 250 Neb. 352, 549 N.W.2d 183 (1996). This court has also determined that the State can discipline and regulate professionals, including suspending the privilege to practice, without running afoul of the Double Jeopardy Clause. *Sedivy v. State*, 5 Neb. App. 745, 567 N.W.2d 784 (1997). Specifically, in *Sedivy*, we stated, "The revocation or suspension of a professional license generally does not constitute punishment for the purposes of double jeopardy analysis but, rather, serves the remedial purpose of protecting the public from unfit practitioners." 5 Neb. App. at 759, 567 N.W.2d at 793. We also observe that Nebraska and Iowa are separate sovereigns and conclude that the discipline imposed on

John by the real estate commissions of two separate sovereign entities did not violate double jeopardy. See *U.S. v. Vinson*, 414 F.3d 924 (8th Cir. 2005) (while one sovereign may not place individual in jeopardy twice for same acts, subsequent prosecution by separate sovereign does not violate Constitution). In this case, John's discipline by the NREC served the remedial purpose of protecting the public from an unfit practitioner and did not constitute punishment for the purposes of double jeopardy analysis. The district court's determination that double jeopardy was not applicable conforms to the law, is supported by competent evidence, and is not arbitrary, capricious, or unreasonable. John's assignment of error is without merit.

Due Process.

John asserts that the district court erred by deciding that the NREC's consideration of John's prior disciplinary record before the NREC did not violate due process. At the close of the evidentiary portion of the NREC hearing, the NREC began its deliberations on the record. John and his counsel were present during the course of the deliberations. First, the NREC deliberated concerning whether John was in violation of § 81-885.24(29) and did find him in violation of that subsection. Then the NREC moved into the penalty phase of the hearing. After the result of the vote on the violation was announced, the NREC chairperson summarized John's prior disciplinary history before the NREC, which showed that John had four previous complaints filed against him between 1986 and 1997, three of which had been dismissed. The history showed that in 1997, John consented to the imposition of a suspension to be served entirely on probation for failing to properly maintain records relating to any real estate transaction, failing to maintain a bookkeeping system which would accurately and clearly disclose full compliance with the laws relating to trust accounts, failing to deposit any funds received as earnest money within 48 hours or before the end of the next banking day after an offer had been accepted, and failing to properly complete and retain the agency acknowledgment disclosure pamphlet. In the 1997 proceeding, a 12-hour continuing education requirement was also imposed. After the chairperson answered a few questions

from other members seeking clarification on various points in John's disciplinary history before the NREC, the NREC then began discussion and voting on what sanction to impose in this case. An initial motion on a proposed sanction did not pass, but the NREC ultimately passed a motion to suspend John's license for 2 years, served on probation except for 60 days, with a continuing education requirement.

[19] John argues that by virtue of the recitation of his prior disciplinary history at the start of the penalty phase of the proceedings, he was somehow subjected to a penalty enhancement, and that his due process rights were accordingly violated. In proceedings before an administrative agency or tribunal, procedural due process requires notice, identification of the accuser, factual basis for the accusation, reasonable time and opportunity to present evidence concerning the accusation, and a hearing before an impartial board. *Betterman v. Department of Motor Vehicles*, 273 Neb. 178, 728 N.W.2d 570 (2007). There is nothing in the record to show that John's procedural due process rights were violated in this case. John was present with his counsel during the disciplinary portion of the hearing, and although the NREC discussed among its members what sanction to impose and did not solicit input from John or his counsel during this portion of the hearing, there is nothing in the record to suggest that John could not have objected in some way if he found the chairperson's recitation of his disciplinary history to be inaccurate. John, in fact, did not argue before the district court, or before this court, that any portion of the recited history was incorrect. The record does not suggest either that John received some form of enhanced sanction. As discussed below, the sanction imposed by the NREC was well within the NREC's authority.

There is no indication in the record that the district court placed any undue emphasis on John's prior disciplinary history in affirming the discipline imposed by the NREC, and we note that in the criminal context, at the sentencing stage of the proceedings, a court may consider many factors that would not be entered into evidence at trial, including past criminal record, which may include information about dismissed charges and sentences imposed for past convictions. See *State v. Archie*, 273

Neb. 612, 733 N.W.2d 513 (2007). The district court's determinations that John's sanction was not enhanced and that his due process argument was without merit conform to the law, are supported by competent evidence, and are not arbitrary, capricious, or unreasonable.

Unworthiness.

[20-22] John asserts that the district court erred by finding that John's conduct constituted unworthiness to act as a broker. John urges this court to find § 81-885.24(29) to be unconstitutionally vague. The Nebraska Court of Appeals cannot determine the constitutionality of a statute, yet when necessary to a decision in the case before it, the court does have jurisdiction to determine whether a constitutional question has been properly raised. *Olson v. Olson*, 13 Neb. App. 365, 693 N.W.2d 572 (2005). To properly raise a challenge to the constitutionality of a statute, a litigant is required to strictly comply with Neb. Ct. R. of Prac. 9E (rev. 2006) and to properly raise and preserve the issue before the trial court. See *Olson, supra.* Because the district court did not pass on the constitutional issue raised by John on appeal, he has waived it. A constitutional issue not presented to or passed upon by the trial court is not appropriate for consideration on appeal. *State v. Moyer*, 271 Neb. 776, 715 N.W.2d 565 (2006).

John argues that he did not violate § 81-885.24(29), because his conduct did not reach the required level of negligence, incompetency, or unworthiness. In *Wright v. State ex rel. State Real Estate Comm.*, 208 Neb. 467, 304 N.W.2d 39 (1981), the Nebraska Supreme Court considered a violation of the "unworthiness" subsection of 81-885.24 and was persuaded and convinced by the language and reasoning in cases such as *Goodley v. N. J. Real Estate Com.*, 29 N.J. Super. 178, 102 A.2d 65 (1954), a case wherein the court held that "unworthiness," as used in the New Jersey statute, "signified the lack of those ethical qualities that befit the vocation." 208 Neb. at 472, 304 N.W.2d at 42. In addressing John's argument in this case, the district court stated:

> John wishes to characterize his wrong doing as a simple failure to adequately supervise David. The [NREC] saw it

> differently and so do I. What John did was knowingly aid David in violating the licensing regulations by representing himself to be the Terrys' agent when, in fact, he was not. John also [re]presented that he witnessed the Terrys' signatures on the offer to purchase when, in fact, he did not. . . . These actions evidence a blatant disregard for the rules of his profession and clearly demonstrate unworthiness to act as a broker.

In his brief on appeal, John argues that he was an "'attesting witness'" rather than a "'subscribing witness,'" arguing that it was entirely reasonable for him to rely on David's representation that the Terrys had signed the offer to purchase. Brief for appellant at 21. We see the more critical facts to be that John allowed David to continue with the Terry transaction although David was not licensed in Iowa and that John, by signing the offer to purchase, held himself out as the Terrys' agent, when he was not. The district court's determination that John's actions clearly demonstrated his unworthiness to act as a broker conforms to the law, is supported by competent evidence, and is not arbitrary, capricious, or unreasonable.

Level of Discipline.

John asserts that the district court erred by determining that the level of discipline imposed by the NREC was not excessive. After determining that John was in violation of § 81-885.24(29), the NREC suspended John's license for 2 years, to be served on probation, except for 60 days. John argues that a suspension served entirely on probation with a continuing education requirement and/or fine would have been more appropriate and that the sanction imposed will operate as a "'death penalty'" for his business. Brief for appellant at 25. The district court simply found that the sanction was not excessive. We agree. The sanction imposed was well within the NREC's authority. See § 81-885.24. The district court's decision regarding John's sanction conforms to the law, is supported by competent evidence, and is not arbitrary, capricious, or unreasonable.

Stay of Execution.

[23] In its cross-appeal, the State asserts that the district court erred by ordering a stay of execution, pending resolution of this

appeal, of the discipline imposed against John. The district court determined that John's motion to stay and to set a supersedeas bond fell within the court's discretionary power to grant or deny, and the court granted the motion, set the amount of supersedeas, and stayed its order of January 30, 2007. The trial court may in its discretion grant supersedeas in cases not specified in Neb. Rev. Stat. § 25-1916 (Cum. Supp. 2006) (general supersedeas statute). *Hall v. Hall*, 176 Neb. 555, 126 N.W.2d 839 (1964). An allowance of supersedeas in such a case may be granted in such an amount and on such conditions as the court determines necessary for the protection of the parties. *Id.*

The State directs our attention to § 84-917(3) (concerning stays of agency decisions in appeals to district court under Administrative Procedure Act) and argues that the provisions of this subsection should continue to apply when an agency decision is further appealed from the district court to this court. Section 84-917(3) provides:

> The filing of the petition or the service of summons upon such agency shall not stay enforcement of a decision. The agency may order a stay. The court may order a stay after notice of the application therefor to such agency and to all parties of record. *If the agency has found that its action on an application for stay or other temporary remedies is justified to protect against a substantial threat to the public health, safety, or welfare, the court may not grant relief unless the court finds that: (a) The applicant is likely to prevail when the court finally disposes of the matter; (b) without relief, the applicant will suffer irreparable injuries; (c) the grant of relief to the applicant will not substantially harm other parties to the proceedings; and (d) the threat to the public health, safety, or welfare relied on by the agency is not sufficiently serious to justify the agency's action in the circumstances.* The court may require the party requesting such stay to give bond in such amount and conditioned as the court may direct.

(Emphasis supplied.)

The State argues that the stay entered by the district court in this case clearly violated § 84-917(3) because the court failed to make findings on the four criteria set forth in that subsection.

The State further argues that after having entered a final order affirming the decision of the NREC, the district court was not in a position to determine that John was "'likely to prevail when the court finally dispose[d] of the matter.'" Brief for appellees on cross-appeal at 41. The State relies on *Miller v. Horton*, 253 Neb. 1009, 574 N.W.2d 112 (1998), wherein the Nebraska Supreme Court found that a stay under § 84-917(3) was improvidently granted because the trial court had not made any of the findings required under that subsection.

We need not determine whether § 84-917(3) is applicable to further appeals of agency decisions from the district court to this court. Even if it were applicable, there is nothing in the record in this case to suggest that the district court would have been required to make findings on the listed criteria. The requirement in § 84-917(3) that the court must make findings on these criteria before granting relief is conditioned upon a finding by the agency that "its action on an application for stay or other temporary remedies is justified to protect against a substantial threat to the public health, safety, or welfare." There is no such finding in the record before us. The court's grant of a stay in this case conforms to the law, is supported by competent evidence, and is not arbitrary, capricious, or unreasonable. Accordingly, the State's assignment of error on cross-appeal is without merit.

CONCLUSION

We affirm the decision of the district court in this case because it conforms to the law, is supported by competent evidence, and is not arbitrary, capricious, or unreasonable.

AFFIRMED.

RENEE K. LUCERO, APPELLANT, V. IVAN M. LUCERO, APPELLEE.
750 N.W.2d 377

Filed May 27, 2008. No. A-07-914.

1. **Modification of Decree: Child Support: Appeal and Error.** An appellate court reviews modifications of child support de novo on the record and will affirm the judgment of the trial court absent an abuse of discretion.

2. **Child Support: Stipulations.** A stipulation for child support is not binding on the court.
3. **Child Support: Rules of the Supreme Court.** Paragraph C of the Nebraska Child Support Guidelines provides that all stipulated agreements for child support must be reviewed against the guidelines and if a deviation exists and is approved by the court, specific findings giving the reason for the deviation must be made.
4. ____: ____. Paragraph L of the Nebraska Child Support Guidelines provides that when a specific provision for joint physical custody is ordered and each party's parenting time exceeds 142 days per year, it is a rebuttable presumption that support shall be calculated using worksheet 3.
5. ____: ____. Paragraph L of the Nebraska Child Support Guidelines provides that when a specific provision for joint physical custody is ordered and one party's parenting time is 109 to 142 days per year, the use of worksheet 3 to calculate support is at the discretion of the court.
6. **Child Support.** Where a parent's annual earnings show a clear pattern of consistently increasing income, current earnings, not income averaging, should be used in calculating the child support obligation.
7. **Child Support: Visitation: Time: Rules of the Supreme Court.** Paragraph J of the Nebraska Child Support Guidelines provides that when there are visitation or parenting time periods of 28 days or more in any 90-day period, support payments may be reduced by up to 80 percent.
8. **Child Support: Proof.** The parent claiming a deduction for health insurance must show that he or she has incurred an increased cost to maintain the coverage for the children over what it would cost to insure himself or herself.
9. **Modification of Decree: Child Support: Time.** Absent equities to the contrary, the modification of child support orders should be applied retroactively to the first day of the month following the filing date of the application for modification.
10. **Child Support.** In the absence of a showing of bad faith, it is an abuse of discretion for a court to award retroactive child support when the evidence shows the obligated parent does not have the ability to pay the retroactive support and still meet current obligations.
11. **Judgments: Proof.** The district court may, on motion and satisfactory proof that a judgment has been paid or satisfied in whole or in part by the act of the parties thereto, order it discharged and canceled of record, to the extent of the payment or satisfaction.
12. **Modification of Decree: Child Support: Time.** The same principles that apply with respect to retroactivity of a new obligation to pay support, i.e., that the obligation can be retroactive to the first day of the month following the filing of a request to modify to impose (or increase) a child support obligation, should generally apply also when the request is to terminate a child support obligation.
13. **Modification of Decree: Child Support: Equity: Estoppel.** When a divorce decree provides for the payment of stipulated sums monthly for the support of a minor child or children, such payments become vested in the payee as they accrue, and generally, the courts are without authority to reduce the amounts of such accrued payments. The articulated exception to the vesting rule concerns situations in which the payee is equitably estopped from collecting the accrued payments.

Appeal from the District Court for Garden County: KRISTINE R. CECAVA, Judge. Affirmed in part as modified, and in part vacated and set aside.

Robert M. Brenner, of Robert M. Brenner Law Office, for appellant.

Leonard G. Tabor, of Leonard G. Tabor Law Office, for appellee.

SIEVERS, MOORE, and CASSEL, Judges.

SIEVERS, Judge.

Renee K. Lucero appeals the decision of the district court for Garden County, Nebraska, modifying child custody, the parties' respective child support obligations, and the visitation provisions. The district court (1) ordered Renee to pay child support in the amount of $439 per month retroactive to June 1, 2007, and (2) retroactively terminated Ivan M. Lucero's child support obligation as of January 31, 2007. We have determined that the matter should be submitted for decision without oral argument pursuant to our authority under Neb. Ct. R. of Prac. 11B(1) (rev. 2006).

FACTUAL AND PROCEDURAL BACKGROUND

Initially, to avoid any confusion, we point out an error by the court reporter. The title page on the testimony in the bill of exceptions recites that the proceedings were had "on August 6, 2006." It is clear from everything else in the proceedings and our record that the trial occurred August 6, 2007.

Renee and Ivan were married at one time and lived in Colorado. The parties have a son, Jerad, born August 15, 1993. Renee and Ivan were divorced in Colorado, and although the date is unclear from the record, we know the decree was entered either in 1999 or 2002. Sometime after the divorce, Renee and Jerad moved to Nebraska and Ivan moved to Florida. And while the divorce decree is not in our record, it is clear that Renee had physical custody of Jerad.

Renee filed a motion to modify the parties' decree pertaining to child support and visitation issues in the district court

for Garden County. In an order filed on November 29, 2004, the district court stated: "NOW on this 14th day of September, 2004, [this] matter comes on by stipulation between the parties concerning child visitation, child support and transportation issues." Based on the oral stipulation of the parties, the district court awarded Ivan 2 months of summer visitation with Jerad, awarded Ivan visitation for one-half of Jerad's Christmas break from school, ordered the parties to each pay half of Jerad's transportation costs for summer and Christmas visitations, and ordered Ivan to pay $524 per month in child support beginning September 1, 2004. The district court stated, "This order shall supersede the previous Colorado order."

On January 30, 2007, Ivan filed a motion to modify the decree, alleging a material change of circumstances. Ivan alleged that (1) the original dissolution decree was entered in the District Court for Jefferson County, Colorado, in 2002 and thereafter said action was transferred to Nebraska; (2) on September 14, 2004, an order was entered by the Garden County District Court which in part ordered Ivan to pay $524 per month in child support commencing September 1, 2004; and (3) there was a material change of circumstances because Jerad was now living with Ivan in Jacksonville, Florida, a move that Renee agreed to, and Jerad started school in Jacksonville on January 8, 2007. Ivan asked the district court to modify the decree previously entered by (1) granting him custody of Jerad; (2) terminating Ivan's child support as of January 1, 2007; (3) determining the proper amount of child support to be paid by Renee; (4) determining the appropriate percentage of Jerad's medical expenses to be paid by each party; and (5) setting a specific visitation schedule for Renee. On May 11, 2007, Ivan filed an amended motion for modification further alleging that Jerad was living with Ivan in Jacksonville "for all of 2007," and he specifically asked the district court to credit him for the child support payments he had been making since January 1, 2007.

Renee entered her voluntary appearance on February 5, 2007. On May 22, she filed her response to Ivan's amended motion for modification and her own cross-motion for modification on visitation. In her answer, Renee (1) admitted that Jerad had been living in Jacksonville "since part of January, 2007 to the

present date," but alleged that Jerad would return to Renee on June 2 and remain with her until at least August 4; (2) alleged that a deviation in the award of child support should be granted because the costs of transportation for contact and visitation with Jerad are now greater and that the costs are within "Section J," the parenting time adjustments of the Nebraska Child Support Guidelines (Guidelines)—she also alleged that the child support should be reduced up to 80 percent during summer visitations; and (3) alleged that setting her child support obligation to commence on January 1, 2007, precedes the filing of the motion and voluntary appearance of Renee and thus would be prejudicial and unjust to her and affect her ability to support another child who needs her support. In her cross-motion on visitation, Renee alleged that given the fact that Jerad may or will return to Ivan, the court must set specific visitation periods for Renee because past issues and problems have occurred which a specific order would address.

In an order filed on August 14, 2007, the district court noted that the parties stipulated at the beginning of trial that (1) Jerad had been living with Ivan in Jacksonville since January 8; (2) the parties should be awarded joint legal custody of Jerad, with Ivan having physical custody; (3) Jerad's residence will be in the State of Florida; (4) visitation should occur during the "Christmas/Winter break" from school and during the summer break from school; (5) Jerad should be with Renee for the majority of the summer; and (6) the cost of transportation should be divided equally between the parties. Therefore, the court ordered that the parties were to have joint legal custody of Jerad with Ivan having physical custody. The district court set a specific visitation schedule for Renee which included summer visitation to "begin one week after the last day of school and is to end one week prior to the commencement of school," 10 days during the "Christmas/Winter break," and unlimited visitation during any time period Renee is visiting in Florida. The district court ordered that the cost of Jerad's round trip airline tickets for visitations with Renee are to be divided equally between the parties, with Renee paying for such costs up front and Ivan reimbursing Renee for one-half of the cost within 30

days of the receipt of the confirmation of flight and the cost thereof from Renee.

The district court further ordered that (1) Ivan's child support obligation was retroactively terminated as of January 31, 2007; (2) any amount paid by Ivan after January 31 is to be credited to any arrears and accrued interest that Ivan owes for child support and then any remaining overpayment "shall . . . constitute a judgment against [Renee], together with interest thereon at the rate of ___ per cent (%) per annum" (the blank was not filled in by the district court); (3) until such time as the judgment is paid in full, Renee is responsible for all of the transportation costs incurred for visitation, that is one-half of the cost of the airline ticket "shall be credited against the unpaid judgment and interest thereon"; (4) Renee's child support obligation is $439 per month commencing June 1; and (5) in the event that Renee has Jerad for more than 30 consecutive days in the summer, her child support for June and July should be abated by one-half. The district court attached two child support worksheets. The first worksheet attached by the district court was a one-page compilation of standard worksheets 1 (basic child support calculation), 4 (number of children calculation), and 5 (deviations worksheet) of the Guidelines. The second worksheet attached by the district court was standard worksheet 3, a calculation for joint physical custody. We note that neither child support worksheet reflects the $439 figure as determined by the district court. Renee timely appeals the district court's order.

ASSIGNMENTS OF ERROR

Renee has properly assigned errors which we will set forth at the beginning of each separate topical section in our analysis section of the opinion.

STANDARD OF REVIEW

[1] An appellate court reviews modifications of child support de novo on the record and will affirm the judgment of the trial court absent an abuse of discretion. *Pool v. Pool*, 9 Neb. App. 453, 613 N.W.2d 819 (2000).

ANALYSIS

Child Support Calculation.

Renee argues that the district court erred in calculating her child support payment of $439 per month by its using incorrect income figures in the basic worksheet attached to the order and by its not taking into account established deviations and other deductions. Renee further argues that the district court's decision is unclear as to whether the district court applied worksheet 3 and thus it erred in either (a) not applying worksheet 3, which both parties stipulated would be used in calculating Renee's child support, or (b) applying worksheet 3, but not applying the correct number of days the child spends with each parent.

The district court attached two child support worksheets to its order, but did not specifically adopt either, although as we have said many times, the trial courts are obligated to do so. The first worksheet attached by the district court was a one-page compilation of standard worksheets 1 (basic child support calculation), 4 (number of children calculation), and 5 (deviations worksheet). The second worksheet attached by the district court was standard worksheet 3, a calculation for joint physical custody. We note that the first worksheet was for 3 children, even though the parties have only 1 child. And worksheet 3 showed that each party had the child for 183 days per year, even though Renee had Jerad only during his Christmas and summer vacation, and thus that worksheet 3 is not accurate. Neither child support worksheet reflects the $439 figure as ordered by the district court.

[2-5] Renee is correct in that both parties agreed that worksheet 3, a calculation for joint physical custody, would be used. However, a stipulation for child support is not binding on the court. See *Bevins v. Gettman*, 13 Neb. App. 555, 697 N.W.2d 698 (2005). Paragraph C of the Guidelines states in part:

> The child support guidelines shall be applied as a rebuttable presumption. All orders for child support obligations shall be established in accordance with the provisions of the guidelines unless the court finds that one or both parties have produced sufficient evidence to rebut the presumption that the guidelines should be applied. *All*

> *stipulated agreements for child support must be reviewed against the guidelines and if a deviation exists and is approved by the court, specific findings giving the reason for the deviation must be made*.

(Emphasis supplied.) Paragraph L of the Guidelines, regarding joint physical custody, states in part:

> When a specific provision for joint physical custody is ordered and each party's parenting time exceeds 142 days per year, it is a rebuttable presumption that support shall be calculated using worksheet 3. When a specific provision for joint physical custody is ordered and one party's parenting time is 109 to 142 days per year, the use of worksheet 3 to calculate support is at the discretion of the court.

In its order, the district court specifically stated that "[t]here is no joint physical custody of the child." If Renee has Jerad with her in Nebraska for the maximum time allowed by the district court, the time she will have Jerad is right at 90 days per year. Therefore, using worksheet 3 to calculate the parties' child support obligation would not be in accordance with paragraph L of the Guidelines and the court did not abuse its discretion in not using worksheet 3. To avoid the cost and delay to the parties involved in remanding the cause for the district court to adopt a worksheet, we will do our own worksheet 1, the basic child support calculation. That said, counsel might read the concurrence in *Moore v. Bauer*, 11 Neb. App. 572, 657 N.W.2d 25 (2003) (suggesting that counsel has obligation to ensure that worksheet has been adopted before filing appeal).

Renee's monthly income is not in dispute, because the parties stipulated that she earns $2,744 gross per month as a salaried employee. However, Ivan's income is somewhat disputed. Ivan is a "float driver" for a shipping company, meaning he covers for people who are sick or who do not come to work. Ivan earns $20.56 per hour and is guaranteed a 35-hour workweek, and after 40 hours he is paid on an overtime basis. The company's overtime is paid on a "bid only basis" based on seniority of employment and is not always available. Ivan testified that the availability of overtime fluctuates. If the company is fully staffed, there is less overtime. During the peak season, such

as Christmastime, employees are required to come to work, so there is no overtime available for Ivan because there are no shifts to cover. Therefore, Ivan testified that during the winter months, he works only a 35-hour week. When asked on cross-examination if he bids on overtime every week, Ivan responded, "Absolutely." Ivan testified that the company is his only source of income—he does not have stocks, bonds, or investments. In determining Ivan's income, the district court said, "[Ivan's] income was obtained by adding the gross income from [his] 2005 W-2 and 2006 W-2 and dividing by half. The resulting figure was divided by 12 to arrive at the monthly income. This includes [Ivan's] overtime as it has historically been earned." Thus, the district court used "income averaging" to determine Ivan's monthly income.

Ivan's W-2's show he earned $44,521.34 in Social Security wages in 2005 and $50,964.68 in Social Security wages in 2006. Also in evidence is an interoffice memorandum from his employer dated March 16, 2007, which showed a breakdown of Ivan's 2006 earnings. In 2006, Ivan earned $35,352.55 base pay, $10,810.10 overtime, and $7,233.28 in "other" pay (including sick pay, holiday pay, vacation, personal, and profit sharing). However, it does not appear that the "other" pay is reasonably available cash which will support Jerad, and therefore, we do not consider such amount. See *Simpson v. Simpson*, 275 Neb. 152, 744 N.W.2d 710 (2008) (expatriate income not considered "reasonably available" for child support payments). The interoffice memorandum also showed that as of March 16, 2007, Ivan's 2007 earnings included $7,401.66 base pay and $789.69 overtime. However, Ivan's earnings from January 1 to March 16, 2007, are from winter months when, as Ivan testified, there is limited overtime. For that reason, we find Ivan's "year-to-date" earnings for 2007 are not a reliable predictor of what his final 2007 wages would be, given that overtime is obviously a substantial part of his pay. Moreover, the W-2's and the information on the interoffice memorandum do not match up, therefore we work with the wages shown on the W-2's.

[6] In *Peter v. Peter*, 262 Neb. 1017, 637 N.W.2d 865 (2002), the Nebraska Supreme Court found that where the obligor's annual earnings show a clear pattern of consistently increasing

income, current earnings, not income averaging, should be used in calculating the child support obligation. However, reference to worksheet 1 of the Guidelines reveals that "[i]n the event of substantial fluctuations of annual earnings of either party during the immediate past 3 years, the income may be averaged to determine the percent contribution of each parent." We have evidence only of Ivan's income from 2005 and 2006 via the W-2's for those years, and from such evidence it does not appear that Ivan's income has "substantially fluctuated," but, rather, the evidence shows that Ivan's income is increasing when compared year over year. Thus, Ivan's current earnings from 2006 will be used to calculate his child support obligation. Therefore, based on his 2006 W-2, we find that Ivan's gross income is $50,964.68 per year, or $4,247.06 per month.

[7] We find that the Renee's child support obligation shall be $446.69 per month. We have attached our child support worksheet calculation using Renee's earnings of $2,744 per month and Ivan's earnings of $4,247.06 per month. In our child support calculation, we gave Ivan a deduction of $65.63 per month for his retirement contributions which were supported by the evidence in our record. The district court found that in the event that Renee has Jerad for more than 30 consecutive days in the summer, her child support for June and July should be abated by one-half. Paragraph J of the Guidelines provides that when there are visitation or parenting time periods of 28 days or more in any 90-day period, support payments may be reduced by up to 80 percent, but that such determination is made using the trial court's discretion. Although Renee will undoubtedly incur additional expenses when Jared is with her, Ivan's costs in maintaining Jared's permanent home will not disappear. Therefore, we cannot say that the trial court abused its discretion in its selection of a 50-percent abatement rather than an 80-percent abatement of Renee's support obligation.

[8] We do not give either parent a deduction for health insurance premiums paid to cover Jerad, because neither party submitted sufficient evidence of the increased cost of such coverage. The parent claiming a deduction for health insurance must show that he or she has incurred an increased cost to maintain the coverage for the children over what it would cost to insure

himself or herself. *Noonan v. Noonan*, 261 Neb. 552, 624 N.W.2d 314 (2001). See, also, paragraph E of the Guidelines. We did not give Renee her requested deduction for retirement savings contributions because there was not sufficient evidence in the record to support such. Finally, we did not give Renee her requested deviation for travel costs associated with Jerad's visitation costs. As will be discussed below, each party is essentially responsible for one-half of Jerad's travel costs, and therefore, no deviation is warranted.

Retroactivity of Child Support.

Renee argues that the district court erred in (1) determining Renee should retroactively commence child support payment on June 1, 2007, and (2) retroactively terminating Ivan's obligation to pay child support as of January 31, 2007, and ordering Renee to pay back child support she had received after such date.

[9] The law in Nebraska is that "[a]bsent equities to the contrary, the modification of child support orders should be applied retroactively to the first day of the month following the filing date of the application for modification." *Theisen v. Theisen*, 14 Neb. App. 441, 451, 708 N.W.2d 847, 855 (2006). Ivan filed his motion for modification on January 30, 2007, requesting that his child support be terminated. Therefore, the retroactivity date, if applicable, would be February 1, 2007.

[10] Of additional import for our holding in this matter is *Cooper v. Cooper*, 8 Neb. App. 532, 538, 598 N.W.2d 474, 478 (1999), which states:

> The rule providing that the status, character, and situation of the parties and attendant circumstances should be considered in determining whether to make child support modifications retroactive naturally requires consideration of the obligated party's ability to pay the lump sum that will necessarily result in such a retroactive order. We find no cases in which the ability of the obligated party to pay the retroactively ordered support is discussed, but we think the ability to pay is a paramount factor. We think that in the absence of a showing of bad faith, it is an abuse of discretion for a court to award retroactive child support when the evidence shows the obligated parent does not

> have the ability to pay the retroactive support and still meet current obligations.

See, also, *Wilkins v. Wilkins*, 269 Neb. 937, 697 N.W.2d 280 (2005) (applying our standard in *Cooper, supra*). Thus, we must consider Renee's ability to pay retroactive support.

At the modification hearing, Renee testified that she does not have the ability to pay any retroactive child support the court might order. She testified that her monthly expenses exceed her monthly income and that she has "[a]bout $4.00" in her bank account. Renee also testified that she has been considering filing for bankruptcy and has seen an attorney regarding such. Exhibit 17, which was received into evidence without objection, includes among other things Renee's accounting of her total debt and her monthly expenses, and statements from four different credit card companies. Exhibit 17 shows that Renee's total debt is in excess of $100,000, almost half of which is credit card debt. Exhibit 17 shows that Renee's monthly expenses are approximately $2,880, which is clearly in excess of her $2,744 per month income which was stipulated to by the parties. The credit card statements from April to July 2007 show that Renee is over her credit limit on three of her credit cards, and within $200 of her limit on a fourth card. Her total credit card charges exceed $47,000. At the time of the statements, Renee was 2 months behind on one credit card and 3 months behind on another. And, her minimum payment due on each of two of the four cards exceeded Renee's monthly income. In addition, a third credit card company was threatening to turn over her account for collection.

Clearly, Renee is in severe financial trouble and lacks the funds with which to make a sizeable retroactive child support payment. Therefore, it was an abuse of discretion under the precedent cited above for the district court to award retroactive child support to Ivan when the evidence shows that the obligated parent, Renee, does not have the ability to pay the retroactive support and still meet current obligations. Therefore, we modify the district court's decision to order that Renee's child support shall begin September 1, 2007.

Turning to the matter of the retroactivity of the termination of Ivan's support obligation, the district court entered a judgment

against Renee which in effect orders her to pay back any child support she received from Ivan after January 31, 2007, by way of a judgment against Renee in Ivan's favor. The trial court also found that of the money paid for child support after January 31, such would first be credited to Ivan's arrears and accrued interest, which amounted to $724 at the time of the hearing, and the remaining amount of support she got after Jerad moved to Florida would constitute a judgment against Renee. But the court did not specify the amount of such judgment.

[11] Ivan cites *Berg v. Berg*, 238 Neb. 527, 471 N.W.2d 435 (1991), to support the district court's judgment against Renee. In *Berg*, the district court credited a father, as against his child support arrearage, for childcare expenses incurred while two of four children for whom he was paying child support were living with him. Finding no abuse of discretion, the Nebraska Supreme Court said that "[t]he district court may, on motion and satisfactory proof that a judgment has been paid or satisfied in whole or in part by the act of the parties thereto, order it discharged and canceled of record, to the extent of the payment or satisfaction." *Berg v. Berg*, 238 Neb. at 530, 471 N.W.2d at 438. Thus, to the extent that the trial court's order allows credit for child support paid after January 31, 2007, against arrearages for past due support, such is clearly authorized by *Berg v. Berg, supra*, and to the extent that Ivan's arrearages and accrued interest are deemed paid (which he testified was in the total amount of $724), such order is affirmed.

[12] But the order in this case goes further than *Berg*. In the instant case, the district court gave Ivan a judgment against Renee for the amounts paid after January 31, 2007, which are over the amount of Ivan's arrearages and interest. Ivan testified that he has been paying $524 per month since Jerad came to live with him in January through the time of trial in early August. His request that his child support obligation be terminated was filed January 30, 2007. The same principles that apply with respect to retroactivity of a new obligation to pay support, i.e., that the obligation can be retroactive to the first day of the month following the filing of a request to modify to impose (or increase) a child support obligation, should, in fairness, generally apply also when the request is to terminate

a child support obligation. In this case, this means that Ivan's obligation could be terminated effective February 1. Thus, he paid 8 months at $524 or $4,192 and had an arrearage of $724, meaning that the judgment against Renee, for "overpaid" child support would be $3,468, and while the district court did not enter an amount for such judgment, the evidence shows that such would be $3,468. But, whether such amount should be repaid via a judgment in circumstances such as those present here was not addressed by the *Berg* court.

[13] Renee argues that the payments she received after January 2007 were hers to keep because the payments vested in her month by month and the law is that the district court cannot forgive accrued child support, which the judgment against her would in effect do. In *Maddux v. Maddux*, 239 Neb. 239, 475 N.W.2d 524 (1991), the court said that it had repeatedly stated the rule that when a divorce decree provides for the payment of stipulated sums monthly for the support of a minor child or children, such payments become vested in the payee as they accrue and that generally, the courts are without authority to reduce the amounts of such accrued payments. The exception to this rule appears to concern situations in which the payee is equitably estopped from collecting the accrued payments. See, *Truman v. Truman*, 256 Neb. 628, 591 N.W.2d 81 (1999); *Redick v. Redick*, 220 Neb. 86, 368 N.W.2d 463 (1985). The *Truman* decision contains an extensive discussion of the issue, including authority from other jurisdictions, but reveals that exception usually comes into play when the payee seeks recovery of accrued but unpaid payments but is estopped by a representation made to the payor that he no longer has to pay child support, typically followed by the passage of substantial time before the payee attempts to collect, as well as a change of position by the payee as required by the traditional elements of equitable estoppel. While the record here shows that Ivan changed position by supporting Jerad in his Florida home, the record has no evidence of any agreement or representation by Renee that support would end in January or February 2007. And here, not only did the payments accrue between February and August 2007, when the case was heard, but Ivan testified that he made all of the accrued payments. Thus, in this

case the payor, Ivan, is seeking the return of payments made to the payee, Renee, rather than Renee seeking unpaid but accrued child support. In short, factually, this case cannot be "force-fitted" into the exception to the vesting rule discussed in *Truman*.

Therefore, we vacate the judgment which has the effect of modifying or forgiving accrued child support payments. We do so because the *Truman* exception to the no forgiveness of accrued child support rule does not apply. And while we admit to some discomfort with this result, given that Ivan was following a court order to pay support which had not yet been modified, meaning that he was supporting Jerad while also making monthly child support payments to Renee, it seems to us that we cannot ignore the fact that Ivan could have sought and likely obtained a temporary order upon motion and affidavit, suspending his payments pending the final hearing on his request to terminate child support payments rather than paying them and hoping to get them back from his financially distressed ex-wife. Ivan's child support payments became vested in Renee as they accrued, and equitable estoppel does not apply; therefore, the district court was without authority to order her to repay such moneys, because doing so nullifies the rule that Renee's child support vests in her month by month as it accrues and *Truman* does not apply. Additionally, the evidence shows that Renee lacks the ability to make such payments, see *Cooper v. Cooper*, 8 Neb. App. 532, 598 N.W.2d 474 (1999). Therefore, for these reasons, we find that the district court abused its discretion in giving Ivan a judgment against Renee for amounts paid after January beyond the credit against his arrearages and interest. Therefore, other than his arrearages and interest being deemed paid, such judgment against Renee is hereby vacated and set aside.

Visitation Travel Costs.

Renee argues that the district court erred in redetermining how the visitation travel costs should be divided. At the beginning of the modification hearing, counsel for both parties stated to the district court what they believed the parties had agreed to. Ivan's counsel stated, "I believe that the parties will

agree that they will split the transportation costs equally." And Renee's counsel stated, "The way we done the transportation that's the only change here is [Ivan] would do the Christmas, the to and from tickets and [Renee] has to do the summer, if you follow me, I hope." During direct examination, Ivan agreed that statements by his counsel and Renee's counsel to the court regarding the parties' agreements were correct. And during her direct examination, Renee agreed that she would be paying for Jerad's flight for summer visitation, and Ivan would be paying for the Christmas flight.

The district court ordered that the cost of Jerad's round trip airline tickets for visitations with Renee are to be divided equally between the parties. However, the district court's order stated that Renee is to pay for Jerad's airline ticket up front and then Ivan is to reimburse Renee for one-half of the cost within 30 days of the receipt of the confirmation of flight and the cost thereof from Renee. It is clear from the record that the parties agreed that Ivan would pay for the Christmas visitation transportation costs and that Renee would pay for the summer visitation transportation costs. Such agreement is practical, is even-handed, and puts the responsibility for securing the ticket on the party paying for such ticket. On the other hand, the district court's decision in this regard is cumbersome and puts all of the purchasing burden on Renee—when she may well be without a credit card, given her dire financial circumstances. Therefore, the district court abused its discretion in its determination of how travel costs would be handled. The court should have ordered such travel costs for visitation be divided as the parties agreed, and we therefore modify the district court's order in this regard.

CONCLUSION

We find that Renee's child support obligation shall be $446.69 per month, beginning September 1, 2007. We have attached our child support worksheet calculation using Renee's earnings of $2,744 per month and Ivan's earnings of $4,247.06 per month. And in the event that Renee has Jerad for more than 30 consecutive days in the summer, her child support for June and July should be abated by 50 percent as the district court ordered.

We find that the district court did not abuse its discretion in giving Ivan a credit against any prior child support arrearage and interest by way of the payments he made after February 1, 2007, and such in the amount of $724 are deemed paid. However, the district court was without authority to enter a judgment against Renee for any "overpayment" of child support by Ivan beyond such arrearage and interest, and therefore to such extent the judgment against Renee is hereby vacated and set aside.

We modify the district court's order regarding the division of travel costs for visitation and order that Ivan will pay for the Christmas transportation costs and Renee will pay for the summer transportation costs.

AFFIRMED IN PART AS MODIFIED, AND IN PART VACATED AND SET ASIDE.

Worksheet 1

BASIC NET INCOME AND SUPPORT CALCULATION

		Mother	Combined	Father
1.	Total monthly income from all sources (except payments received for children of prior marriages and all means-tested public assistance benefits)*	2,744.00		4,247.06
2.	Deductions**			
	a. Taxes***	295.35		587.88
	b. FICA	209.92		324.90
	c. Health insurance****	0.00		0.00
	d. Retirement	0.00		65.63
	e. Child support previously ordered for other children	0.00		0.00
	f. Regular support for other children	0.00		0.00
	g. Total deductions	505.26		978.41
3.	Monthly net income (line 1 minus line 2g)	2,238.74		3,268.65
4.	Combined monthly net income		5,507.39	
5.	Combined annual net income (line 4 times 12)		66,088.64	
6.	Percent contribution of each parent (line 3, each parent, divided by line 4)*****	40.6%		59.4%
7.	Monthly support from table 1		1,098.89	
8.	Each parent's monthly share (line 7, times line 6, for each parent)	446.69		652.19

* Court will require copies of last 2 years' tax returns to verify "total income" figures and copies of present wage stubs to verify the pattern of present wage earnings, except where a party is claiming an allowance of depreciation as a deduction from income, in which case a minimum of 5 years' tax returns shall be required. Income should be annualized and divided by 12 to arrive at monthly amounts.

** All claimed deductions should be annualized and divided by 12 to arrive at monthly amounts.

*** Deductions for taxes will be based on the annualized income and the number of exemptions provided by law.

**** The increased cost to the parent for health insurance for the child(ren) of the parent shall be allowed as a deduction from gross income. The parent requesting an adjustment for health insurance premiums must submit proof of the cost of the premium.

***** In the event of substantial fluctuations of annual earnings of either party during the immediate past 3 years, the income may be averaged to determine the percent contribution of each parent as shown in item 6. The calculation of the average income shall be attached to this worksheet.

KAREN D. CHARRON, APPELLEE AND CROSS-APPELLANT, V. CHARLES J. CHARRON, APPELLANT AND CROSS-APPELLEE.
751 N.W.2d 645

Filed June 3, 2008. No. A-07-338.

1. **Divorce: Appeal and Error.** In actions for dissolution of marriage, an appellate court reviews the case de novo on the record to determine whether there has been an abuse of discretion by the trial judge.
2. **Divorce: Property Division.** The purpose of property division is to equitably distribute the marital assets between the parties, and the polestar for such distribution is fairness and reasonableness as determined by the facts of each case.
3. ____: ____. Pursuant to *Grace v. Grace*, 221 Neb. 695, 380 N.W.2d 280 (1986), a "*Grace* award" is a device to fairly and reasonably divide marital estates where the prime asset in contention is one spouse's gifted or inherited stock or property in a family agriculture organization.

Appeal from the District Court for Buffalo County: JOHN P. ICENOGLE, Judge. Affirmed.

Kent A. Schroeder, of Ross, Schroeder & George, L.L.C., for appellant.

John O. Sennett and Julianna S. Jenkins, of Sennett, Duncan, Borders & Jenkins, P.C., L.L.O., for appellee.

SIEVERS, MOORE, and CASSEL, Judges.

SIEVERS, Judge.

Karen D. Charron and Charles J. Charron (Joe) were married on February 20, 1988, and the district court for Buffalo County, Nebraska, dissolved their marriage by a decree of dissolution on March 14, 2006. Neither party is completely satisfied with the trial court's decree, as Joe has appealed and Karen has cross-appealed.

FACTUAL BACKGROUND

Karen and Joe were married when she was 18 years old and he was 22. High school is the extent of the education of both parties. During the marriage, four children were born, and the primary responsibility for raising the children was Karen's. The children and their ages at the time of trial were Sara, age 18; Kristie, age 15; Nolan, age 10; and Dustin, age 6. Karen was

responsible for doing the household work, paying the household bills, and occasionally running errands or helping out during branding for the Arrow C Ranch, Inc. She had not been employed during the marriage, other than some part-time cleaning work, but was employed at the time of trial.

Joe has always worked for his family's corporation, Arrow C Ranch (hereinafter the corporation). At the time of the trial, Joe's salary was $1,000 per month. Joe testified that he worked 7 days a week from dawn to dusk and took about 20 days a year off. In addition to Joe's salary, the corporation provided the Charron family's housing, vehicle fuel, utilities, beef, and bulls to service their cow herd. In addition, Joe used the corporation's equipment to farm their land, as well as using the corporation's pasture ground to graze their cattle. Karen and Joe's personal assets included investments of approximately $182,700 plus 138.75 acres of mixed crop and pasture ground worth $130,000. Depending upon whose numbers were used, Karen and Joe had a cow herd of 98 or 81 head. Joe had been given 25 percent of the capital stock of the corporation by his parents, which stock the trial court valued at approximately $1 million.

DECREE OF DISSOLUTION

Joe was awarded custody of the eldest child, Sara, and Karen was awarded custody of the three other children. The trial court noted that Karen was employed on a part-time basis earning $8 per hour and attributed such hourly wage to her on a full-time basis for purposes of the child support calculation. The trial court ordered Joe to pay child support in the amount of $1,171.50 per month, along with 75 percent of unreimbursed medical expenses. The trial court found that the amount of the parties' marital estate was approximately $503,000. Joe was awarded $251,767 of such estate, plus his corporate stock, and Karen was awarded $251,335 of the marital estate. Included in such award to Karen were approximately 138 acres located in "NE ¼ 14-12N-13 West, West of the 6th PM, Buffalo County, Nebraska."

In addition to division of the marital property, Karen sought a "*Grace* award," due to the substantial ownership interest that

Joe had in the his family's corporation and the fact that during the marriage, his work efforts were devoted to the betterment of the corporation. See *Grace v. Grace*, 221 Neb. 695, 380 N.W.2d 280 (1986). The trial court, after reciting the substantial benefits the Charron family received from the corporation other than Joe's somewhat nominal salary, as well as the fact that the parties had a substantial marital estate, found that the case was not appropriate for a *Grace* award to Karen. Karen was awarded alimony of $1,200 per month for 84 consecutive months, to terminate upon Karen's death or remarriage. Other findings and orders in the decree are not pertinent to this appeal.

ASSIGNMENTS OF ERROR

Joe assigns error to the court's award of the 138 acres owned by the parties to Karen, error in the amount of child support which he was ordered to pay, and error in the trial court's failure to award him credit for a certificate of deposit that he owned prior to the parties' marriage. In her cross-appeal, Karen complains of the failure of the trial court to give her a *Grace* award.

STANDARD OF REVIEW

[1] In actions for dissolution of marriage, an appellate court reviews the case de novo on the record to determine whether there has been an abuse of discretion by the trial judge. *Bauerle v. Bauerle*, 263 Neb. 881, 644 N.W.2d 128 (2002). This standard of review applies with respect to the trial court's determination regarding division of property and alimony. See *id.*

ANALYSIS

Award of 138 Acres to Karen.

Joe argues that he should have received the 138 acres owned by the parties. This piece of ground is composed of 58 acres of farm ground, with the balance being a building site and a pasture. Of the farm ground, approximately 45 acres are devoted to row crops and 13 acres to hay. Joe farmed this ground during the marriage under a lease agreement before it was acquired by the parties approximately 2 years before the parties separated. Joe used the land to pasture the parties' cattle herd, and he contended that it was an "integral part" of his farming operation and that he needed it to generate income to support the family. Joe also

argues that the only use Karen would make of the land would be to pasture her eight horses and that there are sufficient liquid assets to award her the cash equivalent of this parcel of land.

In response, Karen asserts that the parties had only owned the ground for 2 years before their separation and that it was acquired through a series of transactions involving her family. Karen does not dispute that Joe could farm the ground, but strongly disputes that it is an "integral part" of his farming operation, given that the corporation owns approximately 5,000 acres, of which it farms 130 acres of row crops and 300 to 400 acres of hay ground. Karen asserts that she would pasture her eight horses and five cows on the ground and raise hay and crops to feed her livestock. Finally, Karen asserts that she would build a home on the acreage, and we note that the family did not have their own home, because housing was provided by the corporation.

[2] Under Neb. Rev. Stat. § 42-365 (Reissue 2004), the purpose of property division is to equitably distribute the marital assets between the parties, and the polestar for such distribution is fairness and reasonableness as determined by the facts of each case. See *Gress v. Gress*, 271 Neb. 122, 710 N.W.2d 318 (2006). Although the trial court's decree of dissolution does not specifically address why Karen rather than Joe was assigned such property, the question for us after our de novo review is simply whether such award was an abuse of discretion. The difficulty is that each party not only wants the land, but has a viable and well-articulated reason behind such desire. Obviously, the trial court found it reasonable and equitable to award the land to Karen. From our review of the record, and recalling Joe's involvement with the corporation, it seems that it may well be a stretch to conclude that the ground in question is an "integral part" of Joe's farming and ranching operation, as he asserts. Both parties have appropriate uses for the ground, and we cannot say that the trial court abused its discretion or that its treatment of this parcel was unreasonable or unfair.

Child Support.

The trial court's decree orders Joe to pay $1,171.50 per month in support until the parties' oldest child is emancipated.

This figure fails to take into account Karen's obligation under the worksheet adopted by the trial court to be responsible for $128.25 per month in support. In short, there is an offset which the trial court appears to have forgotten in drawing up the decree. Karen does not dispute Joe's claim in this regard. We hereby modify Joe's child support obligation, retroactive to the time of the decree, to $1,043.25 per month for three children.

Joe's Premarital Certificate of Deposit.

Joe claims that the trial court should have set aside to him the sum of $27,072 from the marital assets because he brought a certificate of deposit (CD) worth that amount into the marriage. Joe testified that he went to his bank and had them print records going back to the time of his marriage and that such records indicated he then owned a CD in the amount stated above. Joe's testimony concerning what happened to the CD is as follows:

> Q Now, did you and your wife ever cash that [CD] and spend it on household expenses or take a trip or anything like that or did it end up in other investments?
>
> A I believe it probably made its way to the other investments.
>
> Q And why do you believe that?
>
> A Because I know we never cashed it for anything.
>
> Q So why did you move it to other investments?
>
> A For better investment reasons.
>
> Q And so did you move those — that CD to the investments that are found on F2 through F6?
>
> A Yes, I believe so.
>
> Q And possibly F7?
>
> A Yes.

We have tracked "F2" through "F7" down to exhibit 17, where there is a category thereupon designated as "F. LIFE INSURANCE, RETIREMENT PLANS & IRA's." Six of these items are the "investments" where the money from the CD ended up, according to Joe's quoted testimony. These six items include IRA's valued at approximately $70,000 and liquid assets, such as mutual funds, valued at approximately $95,000. The trial court found that the CD Joe had identified as item

"K11," his premarital property, on exhibit 17 had not "adequately been traced into other now existing assets to establish a premarital credit."

The law is that if premarital property can be identified, it is typically set off to the spouse who brought the property into the marriage. *Olson v. Olson*, 13 Neb. App. 365, 693 N.W.2d 572 (2005). But when the actual premarital property no longer exists, then the question of whether there should be a setoff becomes more problematic. The Supreme Court has noted inherent problems with tracing premarital property through disposition and reinvestment during the marriage. See *Rezac v. Rezac*, 221 Neb. 516, 378 N.W.2d 196 (1985) (noting that parties tend to suggest tracing only when there is improvement in value but noting it is not error to restrict credit to identical property which is retained during marriage or to value of property at time of marriage or when disposed of during marriage).

The tracing argued for in this case illustrates many, if not all, of the problems present in tracing premarital assets and emphasizes the need for rather comprehensive and exacting proof of what has happened to a party's premarital asset. Without producing any concrete evidence of the existence of the CD other than his say-so, Joe testifies in effect that "it's in those six investments somewhere." Suffice it to say that the proof in this case falls far short of that seen when a party to a dissolution action makes a successful tracing claim. The burden of proof is on Joe, but he did not show where the money went, that it stayed where it went, or that the investment(s) into which it went gained value rather than lost value. The trial court did not abuse its discretion in rejecting Joe's claim for the tracing of a CD which is alleged to have existed nearly 20 years prior to trial.

Karen's Cross-Appeal Seeking Grace *Award.*

[3] Karen assigns error to the district court's failure to give her a "*Grace* award" which has become a common term of art in dissolution cases, particularly involving farms and ranches, and which derives from the Supreme Court's opinion in *Grace v. Grace*, 221 Neb. 695, 380 N.W.2d 280 (1986). We comprehensively discussed the concept of a *Grace* award

and the application of *Grace, supra*, in our decision in *Walker v. Walker*, 9 Neb. App. 834, 622 N.W.2d 410 (2001). For the sake of judicial efficiency, we will not repeat that discussion and analysis here beyond our description of a *Grace* award "as a device to fairly and reasonably divide marital estates where the prime asset in contention is one spouse's gifted or inherited stock or property in a family agriculture organization." *Id.* at 843, 622 N.W.2d at 417. We also note the Supreme Court's decision in *Medlock v. Medlock*, 263 Neb. 666, 679, 642 N.W.2d 113, 125-26 (2002), in which the Supreme Court used the following description of its decision in *Grace, supra*: "[W]e ordered a cash award as compensation for the inadequacy of the marital estate."

The inadequacy of the marital estate in cases of this nature involves a typical factual pattern where the wife devotes herself to running the household and caring for the children and where the husband's labors are devoted to a family farming or ranching corporation in which he owns stock, usually owned prior to the marriage or gifted solely to him during the marriage. Hence, under our cases, the stock is treated as the husband's separate property. Additionally, in the typical situation where the issue arises, the husband receives a rather nominal cash salary in exchange for his labor devoted to his family's farm or ranch but also receives such things as housing, utilities, vehicles, fuel, beef, use of the corporation's land for his private livestock herd, et cetera. As a result of the low cash earnings of the husband, the couple often has an inconsequential marital estate. This typical factual backdrop helps explain the Supreme Court's reference in *Medlock, supra*, to a *Grace* award as compensation for the inadequacy of the marital estate. In the instant case, the trial court found significant factual differences between this case and *Grace, supra*; therefore, the trial court denied Karen's request for a *Grace* award.

We review the trial court's decision in this respect de novo for an abuse of discretion. Given that the parties were married rather young and that Joe is only in his early 40's and Karen in her late 30's, it cannot be said that their marital estate that the trial court valued at $503,000—a value undisputed in this appeal—is inadequate. The trial court evenly divided the

marital estate and, in addition, awarded Karen 7 years' worth of alimony at the rate of $1,200 per month.

The overriding concern is whether the division is fair and reasonable, recognizing the substantial factual difference between the instant case and *Grace, supra*; *Medlock, supra*; and *Walker, supra*, because the parties here have a substantial marital estate. Therefore, the instant case is distinguishable from *Grace, supra*, as well as the cases we have mentioned that followed it and where a *Grace* award was made. Additionally, the division of the marital estate was equal and thus was clearly fair and reasonable. Hence, we cannot say that the trial court abused its discretion in declining to make a *Grace* award to Karen.

CONCLUSION

Finding no merit to the assignments of error raised by either Karen or Joe, we affirm the decision of the district court in all respects, except for the minor correction to Joe's child support obligation.

AFFIRMED.

RICHARD H. BOXUM, APPELLANT, V. SHERRY L. MUNCE AND HARRY J. MUNCE, APPELLEES.

751 N.W.2d 657

Filed June 3, 2008. No. A-07-552.

1. **Judgments: Statutes: Appeal and Error.** To the extent an appeal calls for statutory interpretation, it represents a question of law, and an appellate court must reach an independent conclusion irrespective of the determination of the lower court.
2. **Secured Transactions: Trusts: Deeds: Limitations of Actions.** At any time within 3 months after any sale of property under a trust deed, as provided in Neb. Rev. Stat. § 76-1013 (Reissue 2003), an action may be commenced to recover the balance due upon the obligation for which the trust deed was given as security.
3. **Secured Transactions: Trusts: Deeds.** The Nebraska Trust Deeds Act provides a specific statutory plan to obtain performance of an obligation, prescribes a distinct procedure to dispose of security for performance of an obligation, and, generally, authorizes a form of financing quite apart from other methods recognized under Nebraska law.
4. **Limitations of Actions: Legislature: Intent.** A special statute of limitations controls and takes precedence over a general statute of limitations because the special statute is a specific expression of legislative will concerning a particular subject.

5. **Secured Transactions: Trusts: Deeds: Limitations of Actions: Foreclosure.** The 3-month statute of limitations under Neb. Rev. Stat. § 76-1013 (Reissue 2003) is applicable to a suit which seeks a deficiency judgment on a particular obligation that was secured by the particular trust deed that was foreclosed.
6. ____: ____: ____: ____: ____. The 3-month statute of limitations under Neb. Rev. Stat. § 76-1013 (Reissue 2003) applies only when the suit for deficiency is on the obligation for which the foreclosed trust deed was given as security.
7. **Secured Transactions: Trusts: Deeds: Limitations of Actions.** The obligation secured by a deed of trust, not the title to the security, determines applicability or availability of the 3-month statute of limitations under Neb. Rev. Stat. § 76-1013 (Reissue 2003).
8. **Contracts: Guaranty: Debtors and Creditors.** The debtor is not a party to a guaranty, and the guarantor is not a party to the principal obligation; the undertaking of the debtor is independent of the promise of the guarantor and the responsibilities which are imposed by the contract of guaranty differ from those created by the contract to which the guaranty is collateral.

Appeal from the District Court for Lincoln County: JOHN P. MURPHY, Judge. Reversed and remanded for further proceedings.

Wayne E. Griffin for appellant.

Tim W. Thompson and Angela R. Shute, of Kelley, Scritsmier & Byrne, P.C., for appellees.

SIEVERS, MOORE, and CASSEL, Judges.

SIEVERS, Judge.

The district court for Lincoln County, Nebraska, granted summary judgment to the defendants, Sherry L. Munce and Harry J. Munce, husband and wife, who had been sued by Richard H. Boxum upon a guaranty of payment executed by the Munces on February 6, 2002. The district court found that the 3-month statute of limitations in which to collect a deficiency after foreclosure of a trust deed, found in Neb. Rev. Stat. § 76-1013 (Reissue 2003), barred Boxum's lawsuit. This matter is a case of first impression, and we address the scope and reach of the statute of limitations provision in § 76-1013.

FACTUAL AND PROCEDURAL BACKGROUND

The Munces are the mother and stepfather of David S. Carl. In the fall of 1997, David and his wife, Teena R. Carl, were

attempting to buy certain real estate located on West 4th Street in North Platte, Nebraska, which they intended to modify for a daycare business. The sellers of that real estate were Kelly B. Smith and Jo F. Smith, who agreed to "carry back" most of the purchase price. As a result, the Carls executed and delivered their "Promissory Note with Balloon" to the Smiths with the original principal amount of $55,031.88 secured by a deed of trust on the West 4th Street property. Boxum loaned the Carls $14,000 in order that the Carls could complete the purchase from the Smiths, plus another $9,000 with which the Carls were going to modify the property. Such loans were ultimately evidenced by the Carls' promissory note to Boxum in the amount of $28,500 executed and delivered on October 1, 1999. The difference between the amounts loaned and the amount of the promissory note was apparently accrued interest. Such promissory note was secured by a deed of trust on the West 4th Street property. For convenience and clarity, we will refer to the first-described promissory note as the "Carl-Smith note" and the second as the "Carl-Boxum note."

By early 2002, the Carls were delinquent on their payments to the Smiths, who had elected to declare a default and foreclose on the deed of trust given by the Carls to the Smiths. In order to avoid such foreclosure, the Munces apparently sought the assistance of Boxum. As a result, Boxum agreed to pay off the obligation due the Smiths in return for an assignment of the Carl-Smith note to him. As further inducement for Boxum to pay off the Carls' debt to the Smiths, the Munces agreed that they would guarantee payment of the obligations represented by the Carl-Smith note as well as the Carl-Boxum note. We note that we do not have before us, nor did the district court, the deed of trust from the Carls to Boxum. But from other undisputed evidence such as Boxum's affidavit, we know that the only obligation secured by such deed was the Carl-Boxum note.

Accordingly, on January 29, 2002, Boxum paid off the obligation due the Smiths in the amount of $40,623.65. In return, Boxum received an assignment of the Carl-Smith note of October 1, 1997, as well as an assignment of the corresponding deed of trust. On February 6, 2002, the Munces signed and

delivered to Boxum their guaranty of payment with respect to the Carl-Smith note and the Carl-Boxum note.

After receiving the guaranty, Boxum received irregular payments from the Carls, and by mid-December 2003, the Carls had filed a chapter 7 bankruptcy case in the U.S. Bankruptcy Court for the Northern District of Oklahoma. That proceeding ultimately resulted in a discharge of the Carls on April 2, 2004—which included discharge of both the Carl-Smith and the Carl-Boxum notes.

The successor trustee, under the Carl-Boxum deed of trust, gave notice of default on such note on May 12, 2004, indicating that the amount of the indebtedness as of May 10 was $44,258.87. It is noteworthy that the notice of default, after reciting such amount, states that it "does not include any obligations secured by the subject property senior or junior to the said indebtedness secured by said Deed of Trust." The term "said deed of trust" clearly refers to the trust deed given by the Carls to Boxum. The trustee sold the property, and according to the trustee's deed dated November 15, 2004, the highest bid at the trustee's sale was Boxum's $10,000 bid. The evidence shows that this was the only bid. The trustee conveyed the West 4th Street property to Boxum "pursuant to the powers conferred by a Trust Deed with power of sale recorded on December 2, 1999, in Book 621, Pages 485-488, Records of Lincoln County, Nebraska." We note that in neither the notice of default nor the trustee's deed, exhibits 8 and 9 respectively, is there any specific mention whatsoever of the Carl-Smith note. And the notice of default of May 12, 2004, provides that the amount specified therein as owing "does not include any obligations secured by the subject property senior or junior to the said indebtedness secured by said Deed of Trust." Again, the reference to "said deed of trust" is clearly to the Carl-Boxum note. In short, the notice of default excludes the obligations represented by the Carl-Smith note.

On January 24, 2006, Boxum sued the Munces on their guaranty, seeking judgment against them in the amount of $97,116.21, which sum included interest calculated to December 31, 2005, and thereafter accruing at the rate of $25.40 per day. Attached to such complaint is the Munces' guaranty of payment and a

recitation of the details of the Carl-Boxum note as well as the Carl-Smith note. The guaranty includes the recitation that the Munces "absolutely guarantee payment" to Boxum. Moreover, in the guaranty, the Munces acknowledged that both promissory notes were then in default and that each obligation was secured by a deed of trust on the West 4th Street property.

On October 31, 2006, the Munces filed their answer, in which they asserted that Boxum's action was filed out of time, given the 3-month limitation period in the Nebraska Trust Deeds Act. See Neb. Rev. Stat. §§ 76-1001 to 76-1018 (Reissue 2003). While other defenses such as lack of consideration for the guaranty of payment were alleged, the Munces' motion for summary judgment was premised solely upon the 3-month limitation found in § 76-1013, and such was the sole basis of the trial court's grant of summary judgment to the Munces. The motion for summary judgment was filed January 23, 2007, heard on April 16, and decided on April 24. The district court found that the matter was controlled by *Sports Courts of Omaha v. Meginnis*, 242 Neb. 768, 497 N.W.2d 38 (1993); that it was "clear that the action was filed outside of the three-month limitation period"; and that as a result, the motion for summary judgment was sustained and the complaint dismissed. Boxum timely appeals.

ASSIGNMENT OF ERROR

Restated and summarized, Boxum's assignment of error is simply that the district court erred in granting summary judgment to the Munces on the basis of the 3-month statute of limitations in the Nebraska Trust Deeds Act.

STANDARD OF REVIEW

[1] Our examination of the record reveals no material issue of disputed fact, but, rather, an issue of law involving statutory interpretation. The rule is well-established that to the extent an appeal calls for statutory interpretation, it represents a question of law, and an appellate court must reach an independent conclusion irrespective of the determination of the lower court. See *Hawkins v. City of Omaha*, 261 Neb. 943, 627 N.W.2d 118 (2001).

ANALYSIS

[2] Although we have previously referred to the 3-month statute of limitations a number of times, we now set forth the relevant statute, § 76-1013, which provides:

> *At any time within three months after any sale of property under a trust deed, as hereinabove provided, an action may be commenced to recover the balance due upon the obligation for which the trust deed was given as security*, and in such action the complaint shall set forth the entire amount of the indebtedness which was secured by such trust deed and the amount for which such property was sold and the fair market value thereof at the date of sale, together with interest on such indebtedness from the date of sale, the costs and expenses of exercising the power of sale and of the sale. Before rendering judgment, the court shall find the fair market value at the date of sale of the property sold. The court shall not render judgment for more than the amount by which the amount of the indebtedness with interest and the costs and expenses of sale, including trustee's fees, exceeds the fair market value of the property or interest therein sold as of the date of the sale, and in no event shall the amount of said judgment, exclusive of interest from the date of sale, exceed the difference between the amount for which the property was sold and the entire amount of the indebtedness secured thereby, including said costs and expenses of sale.

(Emphasis supplied.)

We have emphasized that portion of the statute which is crucial in this appeal. However, we first turn to *Sports Courts of Omaha v. Meginnis*, 242 Neb. 768, 497 N.W.2d 38 (1993), relied upon by the trial court. While there are several other appellate decisions involving § 76-1013, they all generally involve the question of determining the fair market value of the property sold under a trust deed. *Meginnis* is the only case discussing the statute of limitations found in § 76-1013.

[3] *Meginnis* was tried on stipulated facts which revealed that Harry Meginnis and Tom Schuessler were shareholders in Tom-Har, Inc., and that Sports Courts of Omaha, Ltd. (Sports Courts), sold an Omaha sports fitness facility, including real

estate, to Tom-Har for $600,000 reflected by a promissory note signed by Tom-Har, Schuessler, and Meginnis as comakers. The note was secured by a trust deed on the real estate involved in the sale. In August 1985, after Tom-Har failed to pay the note and had received Sports Courts' notice of default, the trustee, acting under the power of sale expressed in the trust deed, sold the real estate, but the proceeds were insufficient to pay the indebtedness on the underlying promissory note. While the *Meginnis* opinion traces a twisted path of litigation to attempt to collect the deficiency after the trust deed sale, we will not recite that history. It is sufficient for our purposes that the action to collect the deficiency in *Meginnis* was clearly filed more than 3 months after the trust deed sale. The *Meginnis* court initially recalled its decision in *Blair Co. v. American Savings Co.*, 184 Neb. 557, 169 N.W.2d 292 (1969), which upheld the constitutionality of the Nebraska Trust Deeds Act. The *Meginnis* court reiterated its observation from *Blair* that the Nebraska Trust Deeds Act provides "a specific statutory plan to obtain performance of an obligation, prescribes a distinct procedure to dispose of security for performance of an obligation, and, generally, authorizes a form of financing quite apart from other methods recognized under Nebraska law." 242 Neb. at 774, 497 N.W.2d at 42. The *Meginnis* court framed the issue of first impression it was deciding as, "Which statute of limitations, § 25-205 or § 76-1013, controls the time for commencement of an action to recover the balance due on the obligation secured by a deed of trust?" 242 Neb. at 774-75, 497 N.W.2d at 42-43.

[4] In answering this question, the *Meginnis* court set forth the well-known rule that when statutory language is plain and unambiguous, no judicial interpretation is needed to ascertain the statute's meaning, so that, in the absence of a statutory indication to the contrary, words in a statute will be given their ordinary meaning. Additionally, the court found that "'[a] special statute of limitations controls and takes precedence over a general statute of limitations because the special statute is a specific expression of legislative will concerning a particular subject.'" *Id.* at 775, 497 N.W.2d at 43, quoting *Murphy v. Spelts-Schultz Lumber Co.*, 240 Neb. 275, 481 N.W.2d 422

(1992). After referencing the key statutory language which we emphasized when we quoted the statute at the beginning of our analysis, the *Meginnis* court said that such language "unambiguously expresses that the 3-month statute of limitations applies to an action to recover a deficiency on any obligation, such as a promissory note or other contract, after sale of the real estate which secured the obligation pursuant to the Nebraska Trust Deeds Act." 242 Neb. at 775, 497 N.W.2d at 43. To us, the plain and unambiguous language from the statute which we have emphasized, as well as the foregoing quoted holding, requires that we reverse the district court's decision.

[5,6] The key to the issue before us is recognition that the 3-month limitation is applicable to a suit which seeks a deficiency judgment on a particular obligation that was secured by the particular trust deed that was foreclosed. The 3-month statute of limitations applies only when the suit for deficiency is on the obligation for which the foreclosed trust deed was given as security. This is not the factual situation in the present case.

Here, the evidence is undisputed that the trust deed which was used to foreclose on the West 4th Street property was a trust deed "filed for record on December 2, 1999, as Instrument No. 1599 108415, in Book 621, Page 485-488, Records of Lincoln County, Nebraska." This trust deed secures the Carl-Boxum note in the amount of $28,500 plus accrued interest. Therefore, under the plain language of § 76-1013, Boxum had 3 months from the date of the trustee sale, November 15, 2004, in which to seek a deficiency judgment on that obligation, the Carl-Boxum note. But, this lawsuit is obviously not a suit on the Carls' obligation to Boxum, which was secured by the trust deed that was foreclosed upon. Rather, this suit is upon a completely different and separate obligation of the Munces, entitled "Guaranty of Payment" and dated February 6, 2002, which "absolutely guarantee[s]" their payment of two obligations, the Carl-Boxum note and the Carl-Smith note, each of which was secured by a separate trust deed given by the Carls.

[7] *Sports Courts of Omaha v. Meginnis*, 242 Neb. 768, 775, 497 N.W.2d 38, 43 (1993), states that the 3-month statute of limitations "applies to actions to recover an amount owed 'upon

the obligation for which the trust deed was given as security.'" The fundamental difficulty with applying § 76-1013 to the instant lawsuit is that it is not an action to collect a deficiency on the obligation for which the foreclosed trust deed was given. The Carl-Boxum note is the obligation that the foreclosed trust deed secured—and suit for collection of a deficiency on that obligation must be instituted within 3 months. But, this suit is on the Munces' guaranty of payment, a completely separate and distinct obligation from the promissory note obligation given by the Carls to Boxum. As a security device, Boxum took a trust deed from the Carls, and it is this trust deed which was foreclosed. The fact that Boxum claims that there is still money owing on the Carl-Boxum note, which could be called a deficiency, is a "verbal happenstance in language" that is of no consequence because this action seeks to enforce the contract that the Munces made when they guaranteed payment of both the Carl-Boxum note and the Carl-Smith note. It is not a suit to collect a deficiency *on the obligation secured by the foreclosed trust deed*, but, rather, it is a suit to collect on a separate and different contract—the Munces' guaranty. Therefore, the applicable statute of limitations is that found in Neb. Rev. Stat. § 25-205 (Cum. Supp. 2006), providing for a 5-year statute of limitations on an action on any agreement, contract, or promise in writing. In this regard, we point out that the Nebraska Supreme Court in *Meginnis* stated that it was "the obligation secured by a deed of trust, not the title to the security, [that] determines applicability or availability of the 3-month statute of limitations under § 76-1013." 242 Neb. at 775, 497 N.W.2d at 43. In this case, the "obligation" upon which a deficiency collection suit must be brought within 3 months of the foreclosure is the Carl-Boxum note—not the Munces' guaranty of payment of the Carls' obligation to Boxum.

The *Meginnis* court discussed how Meginnis assumed the obligation to pay the promissory note and, to ensure performance of that obligation, Sports Courts used the Nebraska Trust Deeds Act. But, importantly, Meginnis was a comaker and original obligor on the note. In the case before us, the Munces were not comakers of the note, as was Meginnis, and Boxum did not use the Nebraska Trust Deeds Act to secure the performance

of the Munces' guaranty—because the Munces had no title and thus no trust deed to give.

[8] The essential nature of a guaranty as well as the obligation of a guarantor help clarify that the Munces stand in an entirely different position than do the Carls vis-a-vis Boxum, and, thus, the Munces are not entitled to the protection of the short statute of limitations under the Nebraska Trust Deeds Act, as were the Carls. The law is that the debtor is not a party to a guaranty, and the guarantor is not a party to the principal obligation; the undertaking of the debtor is independent of the promise of the guarantor and the responsibilities which are imposed by the contract of guaranty differ from those created by the contract to which the guaranty is collateral. *National Bank of Commerce Trust & Sav. Assn. v. Katleman*, 201 Neb. 165, 266 N.W.2d 736 (1978). See *In re Estate of Williams*, 148 Neb. 208, 26 N.W.2d 847 (1947).

Finally, we take note of the Munces' argument designated as "III," which asserts that because trust deeds are subject to the same rules and restrictions as mortgages, citing *Blair Co. v. American Savings Co.*, 184 Neb. 557, 169 N.W.2d 292 (1969), the foreclosure of the junior deed of trust, from the Carls to Boxum, extinguishes the debt on the senior deed of trust and note, from the Carls to the Smiths, when the same person or entity holds both the junior and the senior debt—as was true here. See *Tri-County Bank & Trust Co. v. Watts*, 234 Neb. 124, 449 N.W.2d 537 (1989). This claim was not presented to, or decided by, the district court, and hence we neither decide nor express any opinion thereupon.

CONCLUSION

For the foregoing reasons, we reverse the decision of the district court for Lincoln County and find that the 3-month statute of limitations contained in § 76-1013 does not bar this lawsuit against the Munces on the guaranty they gave Boxum. This lawsuit was timely brought.

REVERSED AND REMANDED FOR FURTHER PROCEEDINGS.

STATE OF NEBRASKA, APPELLEE, V. ROGER K. SCHMIDT, SR., APPELLANT.

750 N.W.2d 390

Filed June 3, 2008. No. A-07-556.

1. **Rules of Evidence.** In proceedings where the Nebraska Evidence Rules apply, the admissibility of evidence is controlled by the Nebraska Evidence Rules; judicial discretion is involved only when the rules make discretion a factor in determining admissibility.
2. **Rules of Evidence: Appeal and Error.** The exercise of judicial discretion is implicit in determinations of relevancy under Neb. Evid. R. 401, Neb. Rev. Stat. § 27-401 (Reissue 1995), and prejudice under Neb. Evid. R. 403, Neb. Rev. Stat. § 27-403 (Reissue 1995), and a trial court's decision regarding them will not be reversed absent an abuse of discretion.
3. **Judgments: Words and Phrases.** An abuse of discretion occurs when a trial court's decision is based upon reasons that are untenable or unreasonable or if its action is clearly against justice or conscience, reason, and evidence.
4. **Constitutional Law: Appeal and Error.** An appellate court reviews de novo a trial court's determination of the protections afforded by the Confrontation Clause and reviews the underlying factual determinations for clear error.
5. **Jury Instructions: Judgments: Appeal and Error.** Whether jury instructions given by a trial court are correct is a question of law. When dispositive issues on appeal present questions of law, an appellate court has an obligation to reach an independent conclusion irrespective of the decision of the court below.
6. **Confessions: Police Officers and Sheriffs.** Whether a defendant's statements resulted from an officer's promise is a question of fact.
7. **Motions to Suppress: Appeal and Error.** An appellate court will uphold the trial court's ruling on a motion to suppress unless the trial court's findings of fact are clearly erroneous.
8. ____: ____. An appellate court does not reweigh the evidence or resolve conflicts in the evidence, but, rather, recognizes the trial court as the finder of fact and considers that the trial court observed the witnesses testifying in regard to motions to suppress.
9. **Confessions: Appeal and Error.** A district court's finding and determination that a defendant's statement was voluntarily made will not be set aside on appeal unless this determination is clearly erroneous.
10. **Trial: Evidence: Juries.** A motion in limine is but a procedural step to prevent prejudicial evidence from reaching the jury. It is not the office of a motion in limine to obtain a final ruling upon the ultimate admissibility of the evidence. Rather, its office is to prevent the proponent of potentially prejudicial matter from displaying it to the jury, making statements about it before the jury, or presenting the matter to the jury in any manner until the trial court has ruled upon its admissibility in the context of the trial itself.
11. **Trial: Pleadings: Proof: Appeal and Error.** In order to preserve any error before an appellate court, the party opposing a motion in limine which was granted must

make an offer of proof outside the presence of the jury unless the evidence is apparent from the context within which questions were asked.

12. **Criminal Law: Constitutional Law: Trial: Witnesses.** The right of a person accused of a crime to confront the witnesses against him or her is a fundamental right guaranteed by the 6th amendment to the U.S. Constitution, as incorporated in the 14th amendment, as well as by article I, § 11, of the Nebraska Constitution.
13. **Constitutional Law: Trial: Witnesses.** The functional purpose of the Confrontation Clause is to ensure the integrity of the factfinding process through the provision of an opportunity for effective cross-examination.
14. **Constitutional Law: Trial: Juries: Witnesses.** An accused's constitutional right of confrontation is violated when either (1) he or she is absolutely prohibited from engaging in otherwise appropriate cross-examination designed to show a prototypical form of bias on the part of the witness, or (2) a reasonable jury would have received a significantly different impression of the witness' credibility had counsel been permitted to pursue his or her proposed line of cross-examination.
15. **Trial: Testimony.** The right of cross-examination is not unlimited.
16. **Trial: Testimony: Appeal and Error.** The scope of cross-examination of a witness rests largely in the discretion of the trial court, and its ruling will be upheld on appeal unless there is an abuse of discretion.
17. **Trial: Rules of Evidence: Testimony: Proof: Appeal and Error.** Error may not be predicated upon a ruling of a trial court excluding testimony of a witness unless the substance of the evidence to be offered by the testimony was made known to the trial judge by offer or was apparent from the context within which the questions were asked.
18. **Rules of Evidence: Hearsay: Proof.** Hearsay is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted.
19. **Evidence: Words and Phrases.** Evidence is relevant when it has any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.
20. **Jury Instructions: Proof: Appeal and Error.** In an appeal based on a claim of an erroneous jury instruction, the appellant has the burden to show that the questioned instruction was prejudicial or otherwise adversely affected a substantial right of the appellant.
21. **Jury Instructions: Convictions: Appeal and Error.** Before an error in the giving of instructions can be considered as a ground for reversal of a conviction, it must be considered prejudicial to the rights of the defendant.
22. **Jury Instructions: Appeal and Error.** Jury instructions must be read as a whole, and if they fairly present the law so that the jury could not be misled, there is no prejudicial error.
23. **Confessions: Appeal and Error.** In making the determination of whether a statement is voluntary, a totality of the circumstances test is applied, and the determination reached by the trial court will not be disturbed on appeal unless clearly wrong.
24. **Confessions: Police Officers and Sheriffs.** Generally, a defendant's statement is inadmissible only if the totality of the circumstances shows that the police offered the defendant a benefit in exchange for the statement.

25. **Confessions.** If a benefit is offered in exchange for testimony, and the offer is definite, then a confession is involuntary and must be suppressed.
26. **Confessions: Police Officers and Sheriffs: Evidence.** Mere deception will not render a statement involuntary or unreliable; the test for determining the admissibility of a statement obtained by police deception is whether that deception produced a false or untrustworthy confession or statement.

Appeal from the District Court for Jefferson County: PAUL W. KORSLUND, Judge. Affirmed.

James R. Mowbray and Kelly S. Breen, of Commission on Public Advocacy, for appellant.

Jon Bruning, Attorney General, and James D. Smith for appellee.

SIEVERS, MOORE, and CASSEL, Judges.

MOORE, Judge.

INTRODUCTION

Roger K. Schmidt, Sr., appeals from his convictions following a jury trial in the district court for Jefferson County of one count of first degree sexual assault on a child and four counts of sexual assault of a child. On appeal, Roger raises issues relating to the court's rulings on the State's motion in limine and on the State's objection to certain cross-examination questioning, a particular jury instruction, and the admission of certain statements Schmidt made to a police officer. For the reasons set forth herein, we affirm.

BACKGROUND

On May 16, 2006, Schmidt was charged with two counts of first degree sexual assault on a child in violation of Neb. Rev. Stat. § 28-319(1)(c) (Reissue 1995), a Class II felony, and five counts of sexual assault of a child in violation of Neb. Rev. Stat. § 28-320.01 (Cum. Supp. 2004), a Class IIIA felony. The alleged victims were M.C., R.S., and K.S.

On September 7, 2006, Schmidt filed a motion to suppress statements he had made. On October 18, the district court entered an order overruling Schmidt's motion concerning statements stemming from interrogations that occurred on April 27 but sustaining his motion as to an interrogation that occurred on

May 1. On March 9, 2007, the district court entered an order ruling on the parties' pretrial motions in limine, in particular sustaining the State's motion in limine. We have set forth additional details of the pretrial proceedings in the analysis section below.

A jury trial was held March 12 through 14, 2007, and on March 14, the jury returned a verdict finding Schmidt guilty of one count of first degree sexual assault on a child and of four counts of sexual assault of a child and not guilty of the remaining two counts. Because of the limited nature of the assignments of error on appeal, we only set forth the portions of the trial testimony as necessary to our resolution of this appeal in the analysis section below.

On May 18, 2007, the district court entered an order sentencing Schmidt to imprisonment for a period of 18 to 25 years on the first degree sexual assault on a child conviction and a period of not less than 5 years nor more than 5 years on each conviction for sexual assault of a child. The court ordered Schmidt's sentences to run consecutively. Schmidt subsequently perfected his appeal to this court.

ASSIGNMENTS OF ERROR

Schmidt asserts that the district court erred in (1) sustaining the State's motion in limine, (2) sustaining the State's objection to certain cross-examination questioning of a witness regarding an unfounded allegation, (3) submitting jury instruction No. 14, and (4) admitting Schmidt's statements to a police officer.

STANDARD OF REVIEW

[1-3] In proceedings where the Nebraska Evidence Rules apply, the admissibility of evidence is controlled by the Nebraska Evidence Rules; judicial discretion is involved only when the rules make discretion a factor in determining admissibility. *State v. Kuehn*, 273 Neb. 219, 728 N.W.2d 589 (2007). The exercise of judicial discretion is implicit in determinations of relevancy under Neb. Evid. R. 401, Neb. Rev. Stat. § 27-401 (Reissue 1995), and prejudice under Neb. Evid. R. 403, Neb. Rev. Stat. § 27-403 (Reissue 1995), and a trial court's decision regarding them will not be reversed absent an abuse of

discretion. *State v. Gutierrez*, 272 Neb. 995, 726 N.W.2d 542 (2007), *cert. denied sub nom. Sommer v. Nebraska*, 552 U.S. 876, 128 S. Ct. 186, 169 L. Ed. 2d 126. An abuse of discretion occurs when a trial court's decision is based upon reasons that are untenable or unreasonable or if its action is clearly against justice or conscience, reason, and evidence. *State v. Archie*, 273 Neb. 612, 733 N.W.2d 513 (2007).

[4] An appellate court reviews de novo a trial court's determination of the protections afforded by the Confrontation Clause and reviews the underlying factual determinations for clear error. *State v. Jacobson*, 273 Neb. 289, 728 N.W.2d 613 (2007).

[5] Whether jury instructions given by a trial court are correct is a question of law. *State v. Fischer*, 272 Neb. 963, 726 N.W.2d 176 (2007). When dispositive issues on appeal present questions of law, an appellate court has an obligation to reach an independent conclusion irrespective of the decision of the court below. *Id.*

[6-9] Whether a defendant's statements resulted from an officer's promise is a question of fact. *State v. Ray*, 241 Neb. 551, 489 N.W.2d 558 (1992). An appellate court will uphold the trial court's ruling on a motion to suppress unless the trial court's findings of fact are clearly erroneous. *State v. Eberly*, 271 Neb. 893, 716 N.W.2d 671 (2006). In making this determination, the appellate court does not reweigh the evidence or resolve conflicts in the evidence, but, rather, recognizes the trial court as the finder of fact and considers that the trial court observed the witnesses testifying in regard to such motions. See *id.* A district court's finding and determination that a defendant's statement was voluntarily made will not be set aside on appeal unless this determination is clearly erroneous. *State v. Walker*, 272 Neb. 725, 724 N.W.2d 552 (2006).

ANALYSIS

Motion in Limine.

Schmidt asserts that the district court erred in sustaining the State's motion in limine, arguing the court's ruling prevented him from presenting relevant evidence that M.C. and K.S. both had previously reported allegations of sexual abuse by other

perpetrators and that by experience, both were aware of the propriety of reporting "'bad touches'" and the protections afforded by their parents, police, and counselors. Brief for appellant at 12. Schmidt argues that he was denied his constitutional rights to confrontation and compulsory process to answer and rebut evidence presented by the State to explain why M.C. and K.S. did not promptly report Schmidt's alleged abuse and why K.S. repeatedly denied her father's allegations against Schmidt.

[10,11] A motion in limine is but a procedural step to prevent prejudicial evidence from reaching the jury. *State v. Timmens*, 263 Neb. 622, 641 N.W.2d 383 (2002). It is not the office of such a motion to obtain a final ruling upon the ultimate admissibility of the evidence. *Id.* Rather, its office is to prevent the proponent of potentially prejudicial matter from displaying it to the jury, making statements about it before the jury, or presenting the matter to the jury in any manner until the trial court has ruled upon its admissibility in the context of the trial itself. *Id.* In order to preserve any error before an appellate court, the party opposing a motion in limine which was granted must make an offer of proof outside the presence of the jury unless the evidence is apparent from the context within which questions were asked. *State v. Bruna*, 12 Neb. App. 798, 686 N.W.2d 590 (2004).

The State's motion in limine is not included in our record, but the record does include the bill of exceptions from the pretrial hearing on the State's motion and certain motions in limine by Schmidt and the district court's rulings on those motions. At the hearing on the motions in limine, Schmidt made an offer of proof consisting of the pretrial depositions of M.C., M.C.'s mother, K.S., and K.S.' parents. The depositions show that M.C. and K.S. were interviewed regarding prior possible allegations of sexual assault by individuals other than Schmidt. Specifically, K.S. was interviewed when she was 4 years old in connection with a suspicion by her parents of a sexual assault by a cousin. M.C. was interviewed when she was approximately 5½ years old, but she made no allegations of sexual assault. Schmidt's counsel argued to the court that he wished to cross-examine K.S. and M.C. regarding these prior matters and to call their parents as witnesses to inquire about the prior

matters. Schmidt's counsel argued further that Schmidt's right of confrontation included the right to inquire regarding the prior matters because they provided a basis for a child witness' becoming educated in the process of making reports of sexual abuse. The court inquired as follows:

> THE COURT: So in other words, if a child knew good-touch bad-touch, had actually reported something like that before, you want to bring that out in cross-examination and/or examination of the parents and then be able to ask why did you wait — why did you wait whatever amount of time you waited before you reported it in this case; is that the gist of it?
>
> [Schmidt's counsel]: That's the gist of it.

On March 9, 2007, the district court entered an order ruling on the motions in limine. The court did not find that the previous matters constituted past sexual behavior within the scope of Neb. Rev. Stat. § 28-321 (Reissue 1995) or that the evidence should be barred under the provisions of Neb. Rev. Stat. § 27-404 (Reissue 1995). The court did find, however, that the evidence should be excluded under the provisions of § 27-403 because any probative value was substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury. Accordingly, the court granted the State's motion in limine.

At trial, Schmidt's counsel cross-examined witnesses, including K.S.' father, who testified on cross-examination that he suspected during the previous 4 years that Schmidt was touching K.S. inappropriately; that he had questioned K.S. repeatedly about this, including questioning in the presence of K.S.' mother; and that K.S. had repeatedly responded, "'No. Roger is my friend.'" On cross-examination of K.S., Schmidt's counsel elicited testimony that K.S. had received bad touches from her cousin, that K.S. had told M.C. about the cousin's bad touches, and that K.S. had responded negatively to certain questioning by her father about being touched by Schmidt. K.S. was asked about inconsistent statements, including her deposition testimony. From M.C., Schmidt elicited testimony that she had known the difference between good and bad touches prior to a school presentation on the topic in April 2006 and had known

the difference for quite some time prior to the presentation. M.C. testified she did not tell her parents or teacher about what Schmidt was doing prior to April 2006 and continued to go over to Schmidt's house and ask Schmidt to take her fishing despite knowing that her parents and teacher would protect her from Schmidt. M.C. was also questioned about prior inconsistent statements and details of her allegations.

We also note that Schmidt's counsel conducted a thorough cross-examination of Katy Hilgenkamp, a licensed mental health practitioner, who testified on direct examination about the difficulties young children who have been sexually abused have in disclosing that abuse. Schmidt's counsel questioned Hilgenkamp about whether children who had been supported by adults when reporting prior sexual abuse would be more likely to report subsequent instances of sexual abuse, and Hilgenkamp testified, "If they have talked about it before and been supported and believed and not punished, I would think that would make it easier for them to report again."

At trial, prior to the presentation of evidence by the defense, Schmidt made a motion asking the court to reconsider its ruling on the State's motion in limine and made an offer of proof limited to the proposed testimony of K.S.' parents and M.C.'s mother. In response to Schmidt's motion, the court stated:

> All right. There is certainly a legitimate argument to be made, as [Schmidt's counsel] has ably been making. That there's relevancy to the matters that were the subject of the State's motion in limine. However, the Court continues to find that any relevancy is outweighed by the lack of probative value, and the other matters in Rule 403. So the Court overrules the motion to reconsider its ruling on the State's motion in limine in light of . . . Hilgenkamp's testimony.

Schmidt's counsel then proceeded to make his offer of proof and represented that K.S.' parents would testify that 3 weeks before Thanksgiving 2001, K.S. stated her cousin had touched her inappropriately, and that Schmidt had not touched her as of that time. Schmidt's counsel further represented that K.S.' parents would testify that the case involving the cousin had been prosecuted, that K.S. had been interviewed at a child

advocacy center with respect to the cousin, that K.S. had been informed about inappropriate touching, and that K.S. knew the difference between a good touch and a bad touch. Schmidt's counsel represented that M.C.'s mother would testify that in January 2002, there had been an investigation into whether the mother's former boyfriend had inappropriately touched M.C., and that the mother had talked with M.C. about appropriate and inappropriate touching. Following Schmidt's offer of proof, the district court renewed its ruling on the State's motion in limine and excluded the evidence.

[12-16] Schmidt argues that his right of confrontation was denied by the district court's ruling. The right of a person accused of a crime to confront the witnesses against him or her is a fundamental right guaranteed by the 6th amendment to the U.S. Constitution, as incorporated in the 14th amendment, as well as by article I, § 11, of the Nebraska Constitution. *State v. Stark*, 272 Neb. 89, 718 N.W.2d 509 (2006). The functional purpose of the Confrontation Clause is to ensure the integrity of the factfinding process through the provision of an opportunity for effective cross-examination. *Id.* An accused's constitutional right of confrontation is violated when either (1) he or she is absolutely prohibited from engaging in otherwise appropriate cross-examination designed to show a prototypical form of bias on the part of the witness, or (2) a reasonable jury would have received a significantly different impression of the witness' credibility had counsel been permitted to pursue his or her proposed line of cross-examination. *Id.* The right of cross-examination is not unlimited. *Id.* The scope of cross-examination of a witness rests largely in the discretion of the trial court, and its ruling will be upheld on appeal unless there is an abuse of discretion. *Id.*

A review of the trial testimony of K.S. and her parents and M.C. and her mother clearly shows that Schmidt was not absolutely prohibited from engaging in otherwise appropriate cross-examination of the witnesses in question, and there is nothing to suggest that a reasonable jury would have received a significantly different impression of the witnesses' credibility had Schmidt's counsel been permitted to further pursue his proposed line of cross-examination. Accordingly, Schmidt's right

of confrontation was not violated. Nor do we find an abuse of discretion in the district court's exclusion of the evidence on the basis of its lack of probative value and the danger of confusion of the issues. Schmidt's assignment of error concerning the court's ruling on the State's motion in limine is without merit.

Cross-Examination.

Schmidt asserts that the district court erred in sustaining the State's objection to certain cross-examination questioning of a witness regarding an unfounded allegation. Schmidt does not direct us to the point in the record where the court made the ruling of which he complains, but a perusal of Schmidt's cross-examination of M.C. reveals the following exchange concerning another child, "T.B.":

> [Schmidt's counsel:] Did you tell [an interviewer] at the Child Advocacy Center . . . that you would play cards with [Schmidt] and [T.B.] and observe [Schmidt] touch [T.B.'s] vagina?
>
> [Prosecutor]: I'm going to object, Your Honor, on relevancy and hearsay.
>
> THE COURT: Sustained.
>
> [Schmidt's counsel]: Judge, I'm not trying to prove [the truth of] the matter in statements that she made in an interview with anyone. Statements, I think, are fair game to talk with her about as to whether she made those statements.
>
> THE COURT: All right. I will ask counsel to approach.
>
> (Discussion had off the record.)
>
> THE COURT: All right. And the objection is sustained.

[17] Schmidt argues that his cross-examination of M.C. was thwarted when the court sustained the State's objection; Schmidt contends, "Her allegation that she witnessed [Schmidt] assault another child was unfounded. She may have well admitted this at trial, but this question is unanswered." Brief for appellant at 16. Schmidt further argues that the question was proper as it was relevant to bias, prejudice, and credibility. The State argues that Schmidt has waived this assignment of error because he did not make an offer of proof to establish what M.C.'s testimony would have been had she been allowed to

answer the question. Error may not be predicated upon a ruling of a trial court excluding testimony of a witness unless the substance of the evidence to be offered by the testimony was made known to the trial judge by offer or was apparent from the context within which the questions were asked. *State v. Williams*, 269 Neb. 917, 697 N.W.2d 273 (2005).

Although Schmidt did not make an offer of proof during the course of M.C.'s testimony, he did make an offer of proof at a later point in the trial. Following R.S.' testimony, a break was taken and the jury was escorted out. At that time, the court referred to the sidebar exchange that occurred during M.C.'s testimony, stating that it had been agreed that Schmidt's counsel would be allowed to make a further offer of proof with respect to M.C.'s testimony. At that time, Schmidt's counsel represented to the court that if M.C. were allowed to testify about statements she made at the child advocacy center, she would testify that she identified an occasion in which Schmidt, T.B., and she were playing cards; that she told investigators that Schmidt touched T.B. on her vagina; and that she saw this while she was picking up a card she had dropped off the table. The court noted the offer of proof and again sustained the State's previous hearsay and relevancy objections to the testimony.

[18,19] Hearsay is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted. *State v. Robinson*, 271 Neb. 698, 715 N.W.2d 531 (2006), *cert. denied* 549 U.S. 1283, 127 S. Ct. 1815, 167 L. Ed. 2d 326 (2007). Evidence is relevant when it has any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence. *State v. Iromuanya*, 272 Neb. 178, 719 N.W.2d 263 (2006), *cert. denied* 549 U.S. 1167, 127 S. Ct. 1129, 166 L. Ed. 2d 893 (2007). The difficulty with Schmidt's offer of proof in this instance is that it does nothing to establish whether the allegations regarding Schmidt's actions toward T.B. were unfounded. Despite his counsel's assertion at trial that he did not want to prove the truth of whether Schmidt actually assaulted T.B., when reviewing Schmidt's arguments on appeal, it is clear that Schmidt wanted to prove that the allegations about

assault of T.B. were false and to accordingly attack the credibility of M.C.'s allegations about her own alleged assault. We note that Schmidt was not charged in this case with assaulting T.B. Clearly, the question of whether Schmidt assaulted another girl on a particular occasion does little to make it more or less probable that Schmidt assaulted M.C. on any number of other given occasions. The district court properly excluded the evidence as hearsay, and we find no abuse of discretion in the exclusion of the evidence on the ground of relevancy. Nor do we find a violation of Schmidt's right of confrontation in this instance. Schmidt's second assignment of error is without merit.

Jury Instruction No. 14.

[20-22] Schmidt asserts that the district court erred in submitting jury instruction No. 14. In an appeal based on a claim of an erroneous jury instruction, the appellant has the burden to show that the questioned instruction was prejudicial or otherwise adversely affected a substantial right of the appellant. *State v. Fischer*, 272 Neb. 963, 726 N.W.2d 176 (2007). Before an error in the giving of instructions can be considered as a ground for reversal of a conviction, it must be considered prejudicial to the rights of the defendant. *Id.* Jury instructions must be read as a whole, and if they fairly present the law so that the jury could not be misled, there is no prejudicial error. *Id.*

Jury instruction No. 14 was given over Schmidt's objection and provided, "The testimony of a person who is the victim of a sexual assault, as charged in this case, does not require corroboration. It is for you to decide what weight to give the testimony of [M.C., R.S., and K.S.]" Schmidt argues that this instruction is confusing and misleading when read in conjunction with jury instructions Nos. 2(D) and 3(D)(6). Instruction No. 2(D) provided, "In criminal prosecutions, the burden of proof never shifts from the State to the defendant; hence a conviction can be had only when the jury is satisfied from all the evidence of the defendant's guilt beyond a reasonable doubt." Instruction No. 3(D) provided:

> You are the sole judges of the credibility of the witnesses and the weight to be given to their testimony. In determining this, you may consider . . . .

. . . .

(6) [t]he extent to which the witness is corroborated, if at all, by circumstances or by the testimony of other witnesses you regard as credible.

Jury instruction No. 14 is a correct statement of Nebraska law. Neb. Rev. Stat. § 29-2028 (Reissue 1995) provides, "The testimony of a person who is a victim of a sexual assault as defined in sections 28-319 to 28-320.01 shall not require corroboration." Schmidt agrees, but he urges that the instruction should not have been given because it was confusing and misleading when read in conjunction with the other instructions. Schmidt argues that the instruction suggested that the jury should weigh the girls' testimonial credibility without any consideration of corroboration and that it further suggested that the girls were victims of sexual assault. We disagree. When read as a whole, the instructions fairly present the law and are not misleading. The instructions, when taken together, advise the jury that while corroboration of the victim's testimony is not required, corroboration, or the lack thereof, may be considered by the jury in determining the weight to be given to the testimony. The jury clearly did not take the instructions as direction that the girls were victims of the charged sexual assaults, because it found Schmidt not guilty on two of the seven counts. We find no prejudicial error in the giving of jury instruction No. 14.

Statements to Law Enforcement.

Schmidt asserts that the district court erred in admitting Schmidt's statements to a police officer, and he argues that his statements were rendered involuntary by the officer's assurances that Schmidt was not a child molester and that the investigation did not need to be in the newspaper.

At the hearing on Schmidt's pretrial motion to suppress, the court heard testimony from Sgt. Douglas Klaumann of the Fairbury Police Department. Klaumann testified that on April 27, 2006, he was investigating an allegation of a sexual assault of a minor. At approximately 5 p.m., Klaumann telephoned Schmidt at his residence and asked Schmidt to come to the police department to discuss some allegations involving

Schmidt. Schmidt agreed to do so immediately and drove his own vehicle to the station. Upon Schmidt's arrival, he was met by Klaumann and escorted to a room where Klaumann began to interview Schmidt. Klaumann testified that at that time, Schmidt was free to leave. Initially, Klaumann engaged Schmidt in "small talk" before advising Schmidt that he needed to speak with him about some allegations and reading Schmidt his *Miranda* rights. Schmidt stated that he understood his rights, and Klaumann began to question him about certain allegations made by M.C. when she was interviewed at the child advocacy center.

After about 30 minutes of denying any inappropriate touching, Schmidt admitted to inappropriately touching M.C. on two different occasions in the area of her vagina on the exterior of her clothing. At some point, Klaumann indicated to Schmidt that he felt Schmidt was not being truthful. Schmidt responded by blaming M.C. for the inappropriate touching and commented, "'If I touched [M.C., R.S., or K.S.], I didn't mean it.'" Schmidt expressed some concern to Klaumann about the investigation's becoming public knowledge. Specifically, Schmidt expressed concern that the investigation was going to be made public in the news media, and in response, Klaumann advised Schmidt, "I don't do that. I don't call the newspaper and give them [sic] this type of information." Schmidt indicated that he felt that Klaumann was labeling him as a child molester, and Klaumann advised Schmidt that he was not doing so. Eventually, Schmidt began to admit touching M.C. a number of times, and Klaumann made the decision to place Schmidt under arrest. Shortly after concluding the first interrogation, Klaumann interrogated Schmidt again. Klaumann reminded Schmidt of his *Miranda* rights and prior waiver of them but did not fully recite the rights advisory again. In the second interview, Schmidt simply confirmed the statements he made previously in the first interview. Schmidt was then arrested. A recording of Schmidt's statements was received into evidence at the suppression hearing.

Before the district court and on appeal, Schmidt relied on *State v. Erks*, 214 Neb. 302, 333 N.W.2d 776 (1983), a case in which the Nebraska Supreme Court found no clear error in the

trial court's suppression of admissions made after a police officer promised the defendant to stifle publicity about his case. The officer had also told the defendant that the police would protect him and his family from embarrassment if possible.

In its October 18, 2006, order ruling on Schmidt's motion to suppress, the district court indicated that it had listened to the recording of the interrogations in this case. The court noted that although Schmidt was concerned about publicity, Klaumann never promised that there would be no publicity. Klaumann simply told Schmidt that Klaumann did not "put things in the paper" and that as far as Klaumann was concerned, the matter "did not need to be in the paper." The court determined that Schmidt's statements in the first and second interviews by Klaumann on April 27 were not involuntary. The court observed that Klaumann was careful not to make any promises regarding publicity and found the case clearly distinguishable from *State v. Erks*. The court found that the second interrogation carried no taint from the first interrogation and was merely a recapitulation of the previous voluntary statements. The court overruled Schmidt's motion as to the statements stemming from the two interrogations on April 27.

[23-26] In making the determination of whether a statement is voluntary, a totality of the circumstances test is applied, and the determination reached by the trial court will not be disturbed on appeal unless clearly wrong. *State v. McPherson*, 266 Neb. 734, 668 N.W.2d 504 (2003). Generally, a defendant's statement is inadmissible only if the totality of the circumstances shows that the police offered the defendant a benefit in exchange for the statement. *State v. Ray*, 241 Neb. 551, 489 N.W.2d 558 (1992). If a benefit is offered in exchange for testimony, and the offer is definite, then a confession is involuntary and must be suppressed. *Id.* Mere deception will not render a statement involuntary or unreliable; the test for determining the admissibility of a statement obtained by police deception is whether that deception produced a false or untrustworthy confession or statement. *State v. Nissen*, 252 Neb. 51, 560 N.W.2d 157 (1997). We find nothing in the record to suggest that Klaumann offered Schmidt a definite benefit in exchange for his statements or any indication that any deception on the part of Klaumann produced false or

untrustworthy statements from Schmidt. The district court's ruling on Schmidt's motion to suppress is not clearly erroneous.

CONCLUSION

The district court did not abuse its discretion in excluding the evidence referenced in the State's motion in limine, and the ruling did not violate Schmidt's right of confrontation. The court properly sustained the State's objection to certain cross-examination of M.C. The court did not err in giving jury instruction No. 14. The court's ruling on Schmidt's motion to suppress was not clearly erroneous.

AFFIRMED.

CASSEL, Judge, concurring.

I write separately only to emphasize that, in my opinion, a jury instruction such as instruction No. 14 should not be routinely given. Counsel for the State forthrightly conceded at oral argument that it would not have been error for the trial judge to refuse the instruction. An examination of legal standards for giving or refusing instructions, in light of the history of Neb. Rev. Stat. § 29-2028 (Reissue 1995), reveals why, absent unusual circumstances, a judge should not accede to a request for such instruction.

At common law, the testimony of the prosecutrix in the trial of all offenses against the chastity of women was alone sufficient to support a conviction and no corroborating evidence or circumstances were necessary. *State v. Fisher*, 190 Neb. 742, 212 N.W.2d 568 (1973). See, also, 75 C.J.S. *Rape* § 94 (2002). Nebraska initially followed the common-law rule. In *Garrison v. The People*, 6 Neb. 274 (1877), the Nebraska Supreme Court stated that the injured party in such case was a competent witness, but that her credibility must be left to the jury.

In *Mathews v. State*, 19 Neb. 330, 27 N.W. 234 (1886), the Nebraska Supreme Court created a rule requiring corroboration, thereby rejecting a verdict sustained solely by the testimony of the prosecuting witness. The court quoted Sir Matthew Hale's statement that rape "'is an accusation easily to be made and hard to be proved, and harder to be defended [against] by the party accused, though never so innocent.'" *Id*. at 335, 27 N.W. at 236. The court also recognized:

> At common law the accused was not permitted to testify in his own behalf. However false or malicious the charge might be his lips were sealed, and if the prosecutrix testified positively to the facts constituting the offense, and there was no evidence to the contrary, the courts held the evidence sufficient.

Id. at 337, 27 N.W. at 237. Thus, the rule of corroboration was judicially established.

Such rules of corroboration increasingly generated criticism. E.g., Note, *The Rape Corroboration Requirement: Repeal Not Reform*, 81 Yale L.J. 1365 (1972). In 1973, the Nebraska Supreme Court recognized that Nebraska was "in a small minority of states which have adopted an unqualified corroboration rule by judicial decision." *State v. Fisher*, 190 Neb. at 746, 212 N.W.2d at 571. Nonetheless, even after the adoption of a new criminal code in 1977, Nebraska adhered to the rule. Finally, in 1986, while a majority of the Nebraska Supreme Court continued to recognize the rule, three justices opined that the "outdated and discriminatory rule of required corroboration of a victim's testimony regarding a sexual assault should be eliminated from the Nebraska criminal justice system." *State v. Daniels*, 222 Neb. 850, 861-62, 388 N.W.2d 446, 454 (1986) (Shanahan, J., concurring; Krivosha, C.J., and White, J., join). The Legislature responded.

In 1989, the Legislature adopted the statute now codified at § 29-2028. See 1989 Neb. Laws, L.B. 443. As the court's opinion in the instant case recognizes, this statute declares that "[t]he testimony of a person who is a victim of a sexual assault . . . shall not require corroboration." § 29-2028. The senator who introduced the bill explained to the Judiciary Committee:

> LB 443 changes the corroboration rule. Corroboration is a judicially created evidentiary rule that establishes special requirements for sexual assault prosecutions. Specifically, corroboration is additional testimony of [sic] evidence beyond the testimony of a victim. Without corroboration, a conviction for a sexual assault cannot be upheld in Nebraska. . . . Nebraska is the only state that has retained the corroboration rule for all cases of sexual assault. . . . Corroboration is not required for any other criminal

> testimony in Nebraska. . . . The continued existence of the corroboration rule, therefore, does little to protect an innocent defendant, while perpetuating an insulting stereotype of women victims of sexual assault. . . . The Pages have passed out a copy of [Justice] Shanahan's concurring opinion in the Daniels case . . . . In this opinion, [Justice] Shanahan argues for the repeal of the corroboration rule.

Judiciary Committee Hearing, 91st Leg., 1st Sess. 33-34 (Feb. 1, 1989). In *State v. Williamson*, 235 Neb. 960, 458 N.W.2d 236 (1990), the Nebraska Supreme Court acknowledged the legislative demise of the judicially created rule.

Two important and related lessons derive from this history. First, because the corroboration rule had been judicially adopted, there was no prior statute for the Legislature to simply amend or repeal. Thus, elimination of the rule required affirmative legislation. Second, by enacting the statute, the Legislature placed sexual assault prosecutions on equal footing with those of virtually every other criminal offense—no corroboration is required. In other words, in all cases, the jury evaluates the testimony of a victim just as it does the testimony of any other witness.

The legal standards applicable to giving or refusing instructions confirm that the instruction is superfluous. This court has recognized that a slightly different question is presented when the claim is that an instruction should have been given than when the claim is that an instruction should not have been given. *Suiter v. Epperson*, 6 Neb. App. 83, 571 N.W.2d 92 (1997). Despite such difference, I find significance in the State's concession at oral argument.

In reviewing a court's decision to give an instruction, as this court correctly recognizes, all the jury instructions must be read together, and if, taken as a whole, they correctly state the law, are not misleading, and adequately cover the issues supported by the pleadings and the evidence, there is no prejudicial error necessitating reversal. See *State v. Gutierrez*, 272 Neb. 995, 726 N.W.2d 542 (2007), *cert. denied sub nom. Sommer v. Nebraska*, 552 U.S. 876, 128 S. Ct. 186, 169 L. Ed. 2d 126. On the other hand, to establish reversible error from a court's refusal to give a requested instruction, an appellant has the burden to show

that (1) the tendered instruction is a correct statement of the law, (2) the tendered instruction is warranted by the evidence, and (3) the appellant was prejudiced by the court's refusal to give the tendered instruction. *State v. Hessler*, 274 Neb. 478, 741 N.W.2d 406 (2007). In both instances, the instruction must correctly state the law and must be warranted by the evidence. The difference is that as to an instruction given, the question is whether the instructions as a whole thereby became misleading, while as to an instruction refused, we examine whether the appellant was prejudiced by the failure to give the instruction. This inquiry frequently focuses upon whether the substance of the requested instruction was covered in the instructions given. See *State v. Gales*, 269 Neb. 443, 694 N.W.2d 124 (2005).

This court properly rejects Schmidt's argument that the instruction was misleading. Particularly because of the second sentence of instruction No. 14 ("[i]t is for you to decide what weight to give the testimony . . ."), when that instruction is read together with the other instructions, it becomes apparent that the jury is to evaluate a victim's testimony in the same manner as it does the testimony of other witnesses. Such testimony may or may not have corroboration, and the jury may consider the presence or absence of such corroboration in determining the weight to be given to the testimony.

The State's concession at oral argument confirms that it would not have been prejudiced had the court refused the instruction. Because the current law treats the testimony of a victim the same as that of any other witness, the general instruction on credibility of witnesses adequately covers the topic. In instruction No. 14, when one substitutes for the word "victim" the word "witness," "bystander," or "investigator," the redundancy of the instruction becomes manifest.

Whenever an applicable instruction may be taken from the Nebraska Jury Instructions, that instruction is the one which should usually be given to the jury in a criminal case. *State v. Molina*, 271 Neb. 488, 713 N.W.2d 412 (2006). The general instruction regarding witness credibility was adequate to cover the situation in the case before us. Giving the redundant instruction introduced an unnecessary risk of undue emphasis of a part of the evidence. See *State v. Nesbitt*, 264 Neb. 612,

650 N.W.2d 766 (2002). There was no reason to give the instruction, and unless special circumstances in a particular case require such instruction, I respectfully suggest that a trial judge should not do so.

TED DEBOER, APPELLEE, V. NEBRASKA DEPARTMENT OF MOTOR VEHICLES, APPELLANT.

751 N.W.2d 651

Filed June 3, 2008. No. A-07-874.

1. **Administrative Law: Judgments: Appeal and Error.** A judgment or final order rendered by a district court in a judicial review pursuant to the Administrative Procedure Act may be reversed, vacated, or modified by an appellate court for errors appearing on the record.
2. ____: ____: ____. When reviewing an order of a district court under the Administrative Procedure Act for errors appearing on the record, the inquiry is whether the decision conforms to the law, is supported by competent evidence, and is not arbitrary, capricious, or unreasonable.
3. **Administrative Law: Final Orders: Courts: Appeal and Error.** In reviewing final administrative orders under the Administrative Procedure Act, the district court functions not as a trial court but as an intermediate court of appeals.
4. **Administrative Law: Appeal and Error.** Pursuant to Neb. Rev. Stat. § 84-917(5)(a) (Cum. Supp. 2006) of the Administrative Procedure Act, the district court reviews an agency decision de novo on the record of the agency.
5. ____: ____. In a true de novo review, the district court's decision is to be made independently of the agency's prior disposition and the district court is not required to give deference to the findings of fact and the decision of the agency hearing officer.
6. **Administrative Law: Evidence: Words and Phrases.** For purposes of reviewing an order of an administrative agency, competent evidence means evidence which tends to establish the fact in issue.

Appeal from the District Court for Hall County: TERESA K. LUTHER, Judge. Affirmed.

Jon Bruning, Attorney General, Andee G. Penn, and Edward G. Vierk for appellant.

No appearance for appellee.

INBODY, Chief Judge, and MOORE and CASSEL, Judges.

CASSEL, Judge.

INTRODUCTION

The Nebraska Department of Motor Vehicles (the Department) appeals the judgment of the district court for Hall County, which reversed an order of the Department revoking the driver's license of Ted DeBoer for 90 days. We find competent evidence in the record to support the district court's determination that contrary to regulation, the officer who performed a breath test of DeBoer on which the revocation was based failed to observe DeBoer for 15 minutes before conducting the test. We affirm the judgment of the district court.

BACKGROUND

On March 30, 2007, Elliott Gray, an officer with the Grand Island Police Department, stopped DeBoer's vehicle. Gray requested DeBoer to perform field sobriety tests, which DeBoer did unsuccessfully. DeBoer subsequently failed a preliminary breath test. At that point, Gray placed DeBoer under arrest for driving under the influence of alcohol and transported him to the "Public Safety Center" in Grand Island. DeBoer then submitted to a chemical breath test, which disclosed a breath alcohol content (BAC) of .142 grams of alcohol per 210 liters of breath. Gray completed a "Notice/Sworn Report/Temporary License" form (sworn report), which indicated the reasons for DeBoer's arrest and that DeBoer submitted to a breath test that indicated a BAC of .08 or more. The sworn report specifically stated that DeBoer's BAC was .142. The sworn report was forwarded to the Department.

DeBoer requested an administrative license revocation hearing. At the hearing, Gray's sworn report was received into evidence. A "DATAMASTER Checklist Technique" form signed by Gray was also entered into evidence, which form by regulation must be completed by an officer when conducting a breath test. See 177 Neb. Admin. Code, ch. 1, § 007.02C (2004). The checklist includes several directions that the officer must follow when administering a breath test, including a direction requiring the officer to "[o]bserve [the] subject for 15 minutes prior to testing." That direction also requires the officer to record the time observation began and contains a blank line where the

officer is to write the time. Gray entered "2326" as the time the observation period began. Next to each direction on the checklist is a box that the officer is to check off upon completion of each respective direction. Gray checked all of the boxes, indicating that he had completed each direction.

The test result printout from DeBoer's breath test was also entered into evidence. This document is printed out by the breath testing machine upon completion of a test and states the test results and the time the test was conducted. As the regulations refer to this document as the "test record card," we will use such description. The test record card indicated that DeBoer's breath test occurred at "23:39."

At the hearing, Gray testified that he observed DeBoer for 15 minutes prior to administering the breath test to DeBoer. Gray testified that he used his own watch to time the 15-minute period. Gray testified that according to his watch, the observation period began at 23:26 (11:26 p.m.) and DeBoer submitted to the breath test at 23:42 (11:42 p.m.). Gray also testified that he followed the checklist in accordance with title 177 and observed a 15-minute waiting period.

On May 8, 2007, the hearing officer recommended that DeBoer's license be revoked for the statutory period. On May 9, the director of the Department adopted the hearing officer's recommendation and revoked DeBoer's driver's license for 90 days. DeBoer appealed the decision to the district court, which reversed the director's decision, finding that DeBoer met his burden to disprove the Department's prima facie case. The district court found that the checklist and the test record card show noncompliance with 177 Neb. Admin. Code, ch. 1, § 002.01E (2004), because the two documents indicate that DeBoer was not observed for the required 15 minutes before the breath test was administered.

The Department appeals. Pursuant to authority granted to this court under Neb. Ct. R. of Prac. 11B(1) (rev. 2006), this case was ordered submitted without oral argument.

ASSIGNMENTS OF ERROR

On appeal, the Department assigns that the district court erred in finding a lack of compliance with § 002.01E and in

finding that the Department's prima facie case was rebutted as a result.

STANDARD OF REVIEW

[1,2] A judgment or final order rendered by a district court in a judicial review pursuant to the Administrative Procedure Act may be reversed, vacated, or modified by an appellate court for errors appearing on the record. *Hahn v. Neth*, 270 Neb. 164, 699 N.W.2d 32 (2005). When reviewing an order of a district court under the Administrative Procedure Act for errors appearing on the record, the inquiry is whether the decision conforms to the law, is supported by competent evidence, and is not arbitrary, capricious, or unreasonable. *Id.*

ANALYSIS

We begin by observing that at the hearing before the district court, DeBoer was permitted to offer exhibits separately from the agency record. The Department stated that it had no objection to the separate exhibits. The separate exhibits, however, merely duplicated identical exhibits already contained in the agency record.

[3] The court should not have received the separate exhibits. In *Wolgamott v. Abramson*, 253 Neb. 350, 570 N.W.2d 818 (1997), the Nebraska Supreme Court explained that in reviewing final administrative orders under the Administrative Procedure Act, the district court functions not as a trial court but as an intermediate court of appeals. The Supreme Court held that in reviewing a final decision of an administrative agency in a contested case pursuant to the Administrative Procedure Act, a court may not take judicial notice of an adjudicative fact which was not presented to the agency, because the taking of such evidence would impermissibly expand the court's statutory scope of review—de novo on the record of the agency. Thus, the only evidence which should have been allowed by the district court consisted of the agency record, composed of the transcript of filings before the agency and the verbatim transcript of the agency hearing. The district court's judgment noted the duplication of the pertinent documents by references to both the separate exhibit and the exhibit in the agency record.

Because the separate exhibits duplicated content in the agency record, any error in receiving such evidence was harmless. Error without prejudice provides no ground for appellate relief. *Betterman v. Department of Motor Vehicles*, 273 Neb. 178, 728 N.W.2d 570 (2007). Moreover, the Department raised no objection to the duplicate exhibits. A party cannot complain of error which that party has invited the court to commit. *Damrow v. Murdoch*, 15 Neb. App. 920, 739 N.W.2d 229 (2007). One cannot silently tolerate error, gamble on a favorable result, and then complain that one guessed wrong. *Id*. We therefore turn to the issue raised by the Department on appeal to this court.

In the instant case, the sworn report prepared by Gray was entered into evidence and complied with the requirements set forth in Neb. Rev. Stat. § 60-498.01 (Reissue 2004). Once the Department establishes that the officer provided a sworn report containing the recitations required by statute, it has made a prima facie case for license revocation, and the director is not required to prove that the recitations are true. See, *Hahn v. Neth, supra*; *Valeriano-Cruz v. Neth*, 14 Neb. App. 855, 716 N.W.2d 765 (2006). Rather, it becomes the motorist's burden to prove that one or more of the recitations in the sworn report are false. *Id.* The Department established a prima facie case for revocation of DeBoer's license, and the burden then shifted to DeBoer to show that one or more of the recitations in the sworn report were false. The district court found that DeBoer met his burden because the checklist and test record card, when read together, show a lack of compliance with § 002.01E, thereby invalidating the breath test and making the breath test result on the sworn report false.

Section 002.01E requires that "testing records must show adherence to the approved method, and techniques." The testing records consist of two items, the checklist and the test record card. The district court found that the checklist and the test record card show a 13-minute observation period, rather than the required 15-minute period, and, thus, that the testing records show noncompliance with the "approved methods and techniques."

[4,5] Pursuant to Neb. Rev. Stat. § 84-917(5)(a) (Cum. Supp. 2006) of the Administrative Procedure Act, the district court reviews an agency decision "de novo on the record of the agency." In a true de novo review, the district court's decision is to be made independently of the agency's prior disposition and the district court is not required to give deference to the findings of fact and the decision of the agency hearing officer. *Langvardt v. Horton*, 254 Neb. 878, 581 N.W.2d 60 (1998); *Slack Nsg. Home v. Department of Soc. Servs.*, 247 Neb. 452, 528 N.W.2d 285 (1995), *disapproved on other grounds, Betterman v. Department of Motor Vehicles, supra*.

[6] An appellate court reviews the district court's decision for errors appearing on the record. See, Neb. Rev. Stat. § 84-918(3) (Reissue 1999); *Hahn v. Neth*, 270 Neb. 164, 699 N.W.2d 32 (2005). As such, our review is limited to whether the district court's decision conforms to the law, is supported by competent evidence, and is not arbitrary, capricious, or unreasonable. See *Hahn v. Neth, supra*. For purposes of reviewing an order of an administrative agency, competent evidence means evidence which tends to establish the fact in issue. *In re Application of Jantzen*, 245 Neb. 81, 511 N.W.2d 504 (1994).

In the instant case, the testing records present evidence which, if believed, is sufficient to rebut the presumption arising from the sworn report. Gray indicated on the checklist that the 15-minute observation period began at "2326," and the test record card shows that the test occurred at 23:39. Thus, the face of the testing records shows an elapsed time of only 13 minutes, contrary to the 15-minute period required by the regulation. Although Gray testified that he observed DeBoer for the required 15 minutes prior to administering the breath test and used his own watch to do so, the district court in its de novo review was permitted to resolve conflicts in the evidence and was not required to accept Gray's testimony.

We conclude that the district court's factual finding that the testing records fail to adhere to the approved methods and techniques, specifically that the 15-minute observation period was not met, is supported by competent evidence. Accordingly, we cannot conclude that the district court erred in determining

that DeBoer met his burden to disprove the Department's prima facie case.

CONCLUSION

We conclude there is competent evidence to support the district court's findings that the testing records did not comply with the approved methods and techniques as required by § 002.01E and, therefore, that DeBoer disproved the Department's prima facie case. Accordingly, we affirm the judgment of the district court.

AFFIRMED.

ROBERTA J. SHERMAN, APPELLEE, V. BLAINE A. SHERMAN AND FRANCES M. VASA, APPELLANTS.

751 N.W.2d 168

Filed June 10, 2008. No. A-07-024.

1. **Judgments: Appeal and Error.** Where an action at law is tried without a jury, the decision of the trial court has the effect of a jury verdict and will not be disturbed on appeal unless it is clearly wrong.
2. ____: ____. It is not within the province of an appellate court to resolve evidentiary conflicts or to weigh evidence. Rather, it is the appellate court's obligation to review the judgment entered in light of the evidence and to consider the evidence in the light most favorable to the successful party, resolving all conflicts in his favor and granting him the benefit of every inference which is reasonably deducible therefrom.
3. **Trusts: Appeal and Error.** Appeals of matters arising under the Nebraska Probate Code, including trust administration proceedings and proceedings to remove trustees, are reviewed for error on the record.
4. **Judgments: Appeal and Error.** When reviewing a judgment for errors appearing on the record, the inquiry is whether the decision conforms to the law, is supported by competent evidence, and is neither arbitrary, capricious, nor unreasonable.
5. **Trusts.** A trustee shall administer the trust solely in the interests of the beneficiaries.
6. ____. Pursuant to Neb. Rev. Stat. § 30-3862 (Cum. Supp. 2006), the court has the authority to remove a trustee if (1) the trustee has committed a serious breach of trust or (2) lack of cooperation among cotrustees substantially impairs the administration of the trust.
7. **Actions: Parties: Standing.** Before a party is entitled to invoke a court's jurisdiction, that party must have standing to sue.

8. **Assignments: Words and Phrases.** An assignment is a transfer vesting in the assignee all the assignor's rights in property which is the subject of the assignment.
9. **Assignments: Intent.** The intention of the assignor must be to transfer a present interest in the debt or fund or subject matter; if this is clearly expressed, the transaction is an assignment; otherwise not.
10. **Actions: Parties.** Neb. Rev. Stat. § 25-301 (Reissue 1995) provides that every action shall be prosecuted in the name of the real party in interest.
11. **Actions: Parties: Standing.** To determine whether a party is a real party in interest, the focus of the inquiry is whether that party has standing to sue due to some real interest in the cause of action, or a legal or equitable right, title, or interest in the subject matter of the controversy.

Appeal from the District Court for Cherry County: MARK D. KOZISEK, Judge. Affirmed in part, and in part reversed and vacated.

Amy L. Patras and Keith A. Harvat, of Waite, McWha & Harvat, and Michael J. McQuillan, of McQuillan & McQuillan, for appellants.

Michael V. Smith, of Smith & King, P.C., and William B. Quigley, of Quigley, Dill & Quigley, for appellee.

SIEVERS, MOORE, and CASSEL, Judges.

SIEVERS, Judge.

This lawsuit has at its core the operation of the Sherman Ranch (Ranch) located in Cherry County, Nebraska, composed of nearly 15,000 acres including owned and leased land. The Ranch's operation was complicated by the fact that an undivided half of the Ranch's owned land was placed in a trust after the death of the Sherman family patriarch, Hugh Sherman, but the three named trustees ran the Ranch as though the trust did not exist. Moreover, in a number of instances where written agreements were obviously desirable, if for no other reason than to avoid this sort of interfamily litigation, there were no such agreements. Therefore, and perhaps predictably, this litigation ensued.

FACTUAL AND PROCEDURAL BACKGROUND

Hugh and Roberta J. Sherman, husband and wife, were the long-time owners and operators of the Ranch. Beginning in

1997, Hugh requested that Blaine A. Sherman, one of Hugh and Roberta's nine children, move onto the Ranch to help run it. Blaine agreed to move to and work on the Ranch, and he did so beginning May 1, 1998, bringing with him some 230 cow-calf pairs, a number of cattle he was running for a third party, six horses, haying and well-drilling machinery, and a substantial amount of baled hay. He and his family moved into a residence on one of the leased tracts. Although attempts to do so were made, no written agreement was ever reached between Blaine and Hugh or Roberta regarding the terms of his employment and occupancy of the Ranch.

On May 22, 1998, at a time when he was terminally ill, Hugh executed his last will and testament, which established a testamentary credit shelter trust (hereinafter Trust). The Trust was funded with Hugh's undivided one-half interest in approximately 9,000 acres of the Ranch's owned real estate and 160 cows. Roberta, Blaine, and Frances Vasa (Frances), one of Hugh and Roberta's daughters, were named copersonal representatives of the estate and cotrustees of the Trust. The Trust provided that Roberta was to receive all income from the Trust during her lifetime, and as much of the principal of the Trust as the trustees deemed advisable to provide for Roberta's health, education, support, and maintenance. At Roberta's death, the Trust was to terminate and the assets were to be distributed to Hugh and Roberta's children.

Hugh died a week after making the above-described will. Blaine continued working and residing at the Ranch, including running his cattle on the Ranch's pastures. On May 1, 2003, Roberta sent an eviction notice to Blaine and his wife, Helen Sherman. The notice informed Blaine that he was to vacate the Ranch by May 15, as well as remove his livestock.

It was at this time that Roberta brought her son Galen Sherman onto the Ranch to help run it, but both Blaine and Frances had reservations about Galen running the Ranch. Shortly after Blaine was given notice to leave the Ranch, Blaine and Frances determined that Blaine needed to remain involved with the Ranch. Therefore, acting as trustees, Blaine and Frances executed a lease of the Trust's real property (Lease) to Blaine and Helen for $8 per acre. Roberta was not consulted

regarding the Lease or any of its terms, but a copy of the proposed lease was sent to her before it was executed on May 27, 2003. On November 16, 2004, Roberta made a written offer to lease the same land for $16 per acre, but her offer was not accepted by Blaine and Frances.

Blaine and Helen had secured their operating loan from the Purdum State Bank of Purdum, Nebraska, for a number of years. Apparently because of the bank's concerns about the financial stability of Blaine and the Ranch, the bank sought additional security. Thus, on June 24, 2003, Blaine and Helen executed a "Collateral Assignment of Accounts Receivable" (Assignment) to the Purdum State Bank that in pertinent part read as follows: "Blaine Sherman and Helen Sherman . . . hereby assign, transfer and set over to the Bank, all of their right, title and interest in respect to any and all sums of money now due or to become due from Roberta Sherman, whatsoever."

Shortly after Blaine and Frances leased the Trust's ground to Blaine, Roberta brought suit on July 1, 2003, in the district court for Cherry County, requesting that the Lease be voided, Blaine and Frances be removed as trustees, and Blaine be ejected from the Ranch. Blaine counterclaimed, seeking Roberta's removal as trustee, a monetary judgment against Roberta on a promissory note in the amount of $119,300 payable to the Trust, and judgment based on quantum meruit for an amount in excess of $350,000 for Blaine's work on and management of the Ranch. After a lengthy bench trial, Blaine, Frances, and Roberta were removed as trustees and the Lease was voided. Roberta was ordered to pay the Trust $119,300 plus interest. Judgment was entered for Roberta on the remainder of Blaine's counterclaims. Blaine and Frances timely appealed.

ASSIGNMENTS OF ERROR

Blaine and Frances assign, restated, that the district court erred in removing them as trustees; in voiding the Lease; in determining that no contract existed between Roberta and Blaine to make a will; in determining that Blaine lacked standing to bring his counterclaim against Roberta because of the assignment to the Purdum State Bank; in entering judgment for Roberta against Blaine and Frances on their counterclaims

for compensation and reimbursement of expenses, when the court had found that Blaine lacked standing to assert such counterclaims against Roberta because of the Assignment to the Purdum State Bank; in determining that the Assignment was ambiguous; and in overruling the motion for new trial. Blaine and Frances also claim that the trial court's judgment and post-trial "Order on Motions" were not supported by sufficient evidence. We do not address this last assignment, because it is not argued in Blaine and Frances' brief. Errors that are assigned but not argued will not be addressed by an appellate court. *State v. Baue*, 258 Neb. 968, 607 N.W.2d 191 (2000).

STANDARD OF REVIEW

[1,2] Where an action at law is tried without a jury, the decision of the trial court has the effect of a jury verdict and will not be disturbed on appeal unless it is clearly wrong. See *South Sioux City Star v. Edwards*, 218 Neb. 487, 357 N.W.2d 178 (1984). It is not within the province of this court to resolve evidentiary conflicts or to weigh evidence. Rather, it is our obligation to review the judgment entered in light of the evidence and to consider the evidence in the light most favorable to the successful party, resolving all conflicts in his favor and granting him the benefit of every inference which is reasonably deducible therefrom. See *Grubbs v. Kula*, 212 Neb. 735, 325 N.W.2d 835 (1982).

[3,4] Appeals of matters arising under the Nebraska Probate Code, including trust administration proceedings and proceedings to remove trustees, are reviewed for error on the record. See *In re Loyal W. Sheen Family Trust*, 263 Neb. 477, 640 N.W.2d 653 (2002). When reviewing a judgment for errors appearing on the record, the inquiry is whether the decision conforms to the law, is supported by competent evidence, and is neither arbitrary, capricious, nor unreasonable. *Id.*

ANALYSIS

Is Lease Between Blaine and Helen and Trust Void?

[5] There is competent evidence that Blaine and Frances violated their duties as trustees by entering into the Lease, and the voiding of the Lease is an appropriate remedy for such

violation. Neb. Rev. Stat. § 30-3867 (Supp. 2007) describes a trustee's duty of loyalty:

> (UTC 802) (a) A trustee shall administer the trust solely in the interests of the beneficiaries.
>
> (b) Subject to the rights of persons dealing with or assisting the trustee as provided in section 30-38,101, a sale, encumbrance, or other transaction involving the investment or management of trust property entered into by the trustee for the trustee's own personal account or which is otherwise affected by a conflict between the trustee's fiduciary and personal interests is voidable by a beneficiary affected by the transaction unless:
>
> (1) the transaction was authorized by the terms of the trust;
>
> (2) the transaction was approved by the court;
>
> (3) the beneficiary did not commence a judicial proceeding within the time allowed by section 30-3894;
>
> (4) the beneficiary consented to the trustee's conduct, ratified the transaction, or released the trustee in compliance with section 30-3898; or
>
> (5) the transaction involves a contract entered into or claim acquired by the trustee before the person became or contemplated becoming trustee.
>
> (c) A sale, encumbrance, or other transaction involving the investment or management of trust property is presumed to be affected by a conflict between personal and fiduciary interests if it is entered into by the trustee with:
>
> (1) the trustee's spouse;
>
> (2) the trustee's descendants, siblings, parents, or their spouses.

Here, Blaine was a trustee, and therefore his lease of the land runs afoul of the general prohibitions against self-dealing by a trustee. Additionally, his wife, Helen, was a lessee on the Lease, creating a presumption of a conflict of interest. Further, the district court found that although Blaine paid $8 per acre to lease the Trust's portion of the Ranch, Roberta offered $16 per acre. Leasing the ground for the lower price is facially inconsistent with Blaine's and Frances' duty to act for the benefit of Roberta, the life beneficiary, and for the remaindermen—their

seven siblings. The district court found that Blaine and Frances failed to take account of Roberta's interests by not leasing the Ranch to her and, we would add, failed to take into account the remaindermen's interests. The evidence also suggests that Blaine and Frances were more concerned about their own interests in the Ranch, which they were ultimately to inherit along with their siblings, and they set their interests in the Ranch and the Trust property above their duty to Roberta—the life income beneficiary. The evidence supports the conclusion that Blaine and Frances failed in their duty of loyalty to the beneficiary of the Trust, Roberta, when they entered into the Lease. The district court found that the Lease created a conflict of interest for Blaine and Frances, and this finding is not erroneous, because it is supported by competent evidence. Section 30-3867 makes such a transaction voidable by the beneficiary, in this case, Roberta. Therefore, it was an appropriate remedy that the Lease be voided.

Removal of Blaine and Frances as Trustees.

[6] Pursuant to Neb. Rev. Stat. § 30-3862 (Cum. Supp. 2006), the court has the authority to remove a trustee if (1) the trustee has committed a serious breach of trust or (2) lack of cooperation among cotrustees substantially impairs the administration of the trust. The district court found that both Blaine and Frances committed serious breaches of trust. This finding was not error, because it was based on the competent evidence, described above, that not only did Blaine and Frances act without taking Roberta's best interests into account, they also engaged in self-dealing, because the evidence suggests that their motivation for entering into the Lease and refusing to lease the Trust land to Roberta was their concern that Galen could not properly run the Ranch. The evidence did not show this to be a valid concern; in fact, the evidence suggests improvements under Galen's stewardship—for example, in the condition of the pastures and the decreased number of open cows.

Moreover, while the trial court did not specifically make findings concerning such, the fact that Blaine and Frances, as well as Roberta, operated as though there was no Trust is also a serious breach of their duties. The seriousness of this shortcoming is

perhaps best understood by pointing out the inherent complexities of the Ranch after Hugh's death. After Hugh's death, the Ranch was composed of approximately 6,000 acres of leased ground plus 9,000 acres of owned land, of which an undivided half was owned by Roberta and the other undivided half was owned by Hugh's three trustees. While we need not discuss all of the ramifications of this arrangement, suffice it to say that the ownership arrangements of the land, coupled with the fact that Blaine was running his own cattle on the Ranch's land, made for a complex situation that required sophisticated recordkeeping for a variety of purposes. However, all three trustees were apparently largely oblivious to the ramifications of the complicated ownership of the land, as well as their fiduciary duties as trustees. The record shows that for years, the trustees made no efforts to separate Trust property and Trust income from the portion of the Ranch owned individually by Roberta, and the income that such generated. There was a variety of serious breaches of the trustees' duties, and removal was an appropriate remedy.

Did Contract Exist Between Roberta and Blaine for Her to Make Will?

Blaine asserts that Roberta contracted to make a will leaving that portion of the Ranch she owned to him in exchange for his coming back to the Ranch and operating it after Hugh's death. There is no contract between Roberta and Blaine for Roberta to make a will with such provision, because there is no writing that satisfies Nebraska law governing such a contract. Neb. Rev. Stat. § 30-2351 (Reissue 1995) provides:

> A contract to make a will or devise, or not to revoke a will or devise, or to die intestate, if executed after January 1, 1977, can be established only by (1) provisions of a will stating material provisions of the contract; (2) an express reference in a will to a contract and extrinsic evidence proving the terms of the contract; or (3) a writing signed by the decedent evidencing the contract. The execution of a joint will or mutual wills does not create a presumption of a contract not to revoke the will or wills.

At trial, no required writing falling within any of the three possible categories for a valid agreement to make a will as

required by § 30-2351 was introduced into evidence. The district court found there was no contract to make a will, and such conclusion is quite clearly correct.

Did Blaine Have Standing to Sue Roberta?

[7] In the pleadings, Roberta asserts that Blaine did not have standing to bring his counterclaim against Roberta for quantum meruit compensation for working and managing the Ranch and for expenses advanced. Before a party is entitled to invoke a court's jurisdiction, that party must have standing to sue. See *Ponderosa Ridge LLC v. Banner County*, 250 Neb. 944, 554 N.W.2d 151 (1996). The trial court's judgment discusses in detail whether Blaine had standing to assert such claim against Roberta, given the assignment to the Purdum State Bank. This judgment as well as the trial court's ruling on posttrial motions suggest rather clearly that the court intended to rule that Blaine lacked standing. However, its decision on Blaine's claim found in the judgment necessarily carries with it the implicit conclusion that Blaine had standing to sue Roberta.

The order portion of the judgment reads: "6. Judgment is entered for [Roberta] and against the defendant, Blaine Sherman, on his counterclaim." Clearly, the quoted portion of the judgment is a finding on the merits. In order to make such a finding, the party bringing the claim, in this case, Blaine, necessarily would have had to have standing. In summary, the order portion of the judgment quoted above is inconsistent with the trial court's discussion of the issue in both the judgment and the "Order on Motions." Therefore, we turn to the merits of the standing issue.

In the Assignment, Blaine and Helen, as an inducement to the Purdum State Bank's forbearance of collection on promissory notes signed by them, agreed to the following: "Blaine Sherman and Helen Sherman . . . hereby assign, transfer and set over to the Bank, all of their right, title and interest in respect to any and all sums of money now due or to become due from Roberta Sherman, whatsoever."

[8,9] An assignment is a transfer vesting in the assignee all the assignor's rights in property which is the subject of the assignment. See *Craig v. Farmers Mut. Ins. Co.*, 239 Neb. 271,

476 N.W.2d 529 (1991). Blaine's Assignment clearly vested in the assignee, Purdum State Bank, all of Blaine's rights in any money Roberta owed or could owe Blaine. The Nebraska Supreme Court said in *Tilden v. Beckmann*, 203 Neb. 293, 300, 278 N.W.2d 581, 586 (1979), that "the intention of the assignor must be to transfer a present interest in the debt or fund or subject matter; if this is clearly expressed, the transaction is an assignment; otherwise not." Blaine argues that he did not assign a present interest to Purdum State Bank, but only a future interest, and that he was assigning only money "potentially" received from Roberta, not the right to sue on the cause of action to collect money from her. Brief for appellants at 27, citing *Craig v. Farmers Mut. Ins. Co., supra*. In *Craig*, Robert Craig sold his ranch, but the buildings had been damaged before the sale, and Craig, as part of the sale agreement, agreed to "assign to Buyer . . . all right, title and interest of [Craig] to any insurance proceeds for damage . . . prior to the date of [the sale]." 239 Neb. at 273, 476 N.W.2d at 531. When Craig sued his insurer, the insurer argued that Craig lacked standing due to the contract provision discussed above. The Supreme Court found that the provision at issue made closing of the sale possible and that it was not an assignment of policy rights, but, rather, an agreement to assign the proceeds of the policy. Therefore, Craig was found to have standing to sue on the policy. The use of the term "proceeds" in the language of the *Craig* assignment was clearly a limitation on what was assigned, and such a limitation is missing here. And, in *Craig*, there was something "left behind" after the assignment, because Craig would retain the right for fees and costs under Neb. Rev. Stat. § 44-359 (Reissue 2003), as well as some measure of control, because the proceeds went to the buyer only if used for purposes of repair or improvement of the property. In contrast, Blaine and Helen have not limited the scope of the assignment, nor have they retained anything.

The *Craig* court quoted from *Tilden v. Beckmann*, 203 Neb. at 300, 278 N.W.2d at 586, which stated, "It is also the rule that the intention of the assignor must be to transfer a present interest in the debt or fund or subject matter; if this is clearly expressed, the transaction is an assignment; otherwise not." However, the language of the Assignment in this case is clear

that it applies to both Blaine's present and future interests ("to any and all sums of money *now due* or *to become due* from Roberta") (emphasis supplied). We conclude that *Craig* is distinguishable from the present case and that Blaine has assigned away his claims, present and future, against Roberta.

[10,11] Neb. Rev. Stat. § 25-301 (Cum. Supp. 2006) provides, "Every action shall be prosecuted in the name of the real party in interest . . . ." To determine whether a party is a real party in interest, the focus of the inquiry is whether that party has standing to sue due to some real interest in the cause of action, or a legal or equitable right, title, or interest in the subject matter of the controversy. *Stevens v. Downing, Alexander*, 269 Neb. 347, 693 N.W.2d 532 (2005). By executing the Assignment, Blaine (and Helen) ceased to have any interest in the counterclaims he brought against Roberta. Therefore, he did not have standing to sue.

That decided, as we noted earlier, the trial court actually decided the counterclaim in Roberta's favor, which was error because of the lack of standing. Blaine's counterclaim should have simply been dismissed due to the court's lack of jurisdiction. See *Spring Valley IV Joint Venture v. Nebraska State Bank*, 269 Neb. 82, 690 N.W.2d 778 (2005) (in order to invoke court's jurisdiction, one must have standing). Therefore, we modify the trial court's judgment such that Blaine's counterclaim against Roberta is dismissed, and the finding in Roberta's favor on such is reversed and vacated.

CONCLUSION

For the reasons stated above, we affirm the district court's order in part and reverse and vacate in part.

AFFIRMED IN PART, AND IN PART REVERSED AND VACATED.

NEBRASKA DEPARTMENT OF HEALTH AND HUMAN SERVICES, APPELLEE, V. ERIC WILLIAMS, APPELLANT.

752 N.W.2d 163

Filed June 10, 2008. No. A-07-677.

1. **Administrative Law: Judgments: Appeal and Error.** A judgment or final order rendered by a district court in a judicial review pursuant to the Administrative Procedure Act may be reversed, vacated, or modified by an appellate court for errors appearing on the record.
2. ____: ____: ____. When reviewing an order of a district court under the Administrative Procedure Act for errors appearing on the record, the inquiry is whether the decision conforms to the law, is supported by competent evidence, and is neither arbitrary, capricious, nor unreasonable.
3. **Employer and Employee: Words and Phrases.** "Just cause" for employee discipline is that which a reasonable employer, acting in good faith, would regard as good and sufficient reason for formally disciplining an employee, as distinguished from an arbitrary whim or caprice.

Appeal from the District Court for Lancaster County: KAREN B. FLOWERS, Judge. Affirmed.

Eric B. Brown and Ellen A. Deaver, of Atwood, Holsten & Brown, P.C., L.L.O., for appellant.

Jon Bruning, Attorney General, and Vicki L. Adams for appellee.

SIEVERS, CARLSON, and MOORE, Judges.

MOORE, Judge.

INTRODUCTION

Eric Williams appeals the judgment of the district court for Lancaster County, reversing the decision of the Nebraska State Personnel Board (Board) and upholding the decision of the Nebraska Department of Health and Human Services (DHHS) to terminate the employment of Williams. Williams challenges the district court's findings regarding just cause to terminate Williams' employment and the failure to use progressive discipline. Finding no errors appearing on the record, we affirm the decision of the district court.

Pursuant to the authority granted to this court under Neb. Ct. R. of Prac. 11B(1) (rev. 2006), this case was ordered submitted without oral argument.

BACKGROUND

Williams was employed with DHHS as a psychiatric technician in the adolescent unit at the Lincoln Regional Center (LRC). Williams had been employed in that capacity for approximately 10 months before the incident at issue, and his performance evaluations had been positive, with no prior disciplinary actions. Williams' duties consisted of, among other things, checking the patients on a regular basis. On December 6, 2004, Williams, along with coworker Ian Kerkemeyer, was working in the boys' ward on the 3 to 11 p.m. shift. At the beginning of their shifts, Kerkemeyer and Williams were informed that three patients, including S.B. and D.P., may have been planning to attempt to overpower staff and take facility keys in order to escape. Consequently, these patients were placed on "run precaution" status, meaning they were considered to be a risk of escape. LRC policy requires that "run precaution" patients be checked at 10-minute intervals, as opposed to the regular 30-minute intervals.

At approximately 8:15 p.m. on December 6, 2004, Kerkemeyer left the LRC campus to take his 45-minute break. Upon his return, Kerkemeyer was called to assist on the girls' ward due to an uncontrollable patient, returned to the boys' ward at approximately 9:50 p.m., and was again called away to attend to other business. Williams claims that while Kerkemeyer was gone, Williams completed the room checks between 8 and 10:10 p.m., but he was unable to record the checks because Kerkemeyer took the checklist. The record shows that from approximately 10:10 until 11 p.m., Williams was involved in a conversation with one of the nurses and failed to check any of the rooms during that time. At 11 p.m., Williams began checking the patients' rooms. Williams first checked on S.B. and found him present in his room. As Williams checked the other rooms, S.B. left his room and asked Williams' permission to use the bathroom. Williams walked with S.B. to the bathroom, unlocked the door, and then resumed checking the other rooms. At approximately 11:05 p.m., Kerkemeyer returned to the boys' ward with another employee scheduled for the next shift. Kerkemeyer and the other employee began performing the room checks for the shift

change and learned that S.B. was not in his room. A short time later, S.B. was located under a table in D.P.'s room.

Williams and Kerkemeyer were placed on investigatory suspension with pay. On February 7, 2005, DHHS terminated Williams' employment. Williams filed a grievance with the agency director and the Department of Administrative Services employee relations administrator. Both of Williams' grievances were denied. Williams appealed to the Board. Following a hearing, the Board concluded that Williams should be reinstated. DHHS appealed this decision to the district court. The district court reversed the Board's decision, concluding that DHHS did have good cause to terminate Williams' employment. The district court also found that the governing labor agreement did not require imposition of a sanction less than termination. Williams appeals.

ASSIGNMENTS OF ERROR

Williams argues that (1) the district court's finding that just cause existed to support Williams' termination is not supported by competent evidence in the record, does not conform to the law, and is arbitrary and unreasonable; (2) the district court's finding of fact that Williams did not complete the required room checks from 8:15 until 10 p.m. is not supported by the record and is erroneous; and (3) the district court erred as a matter of law in holding that DHHS need not employ progressive discipline under the governing labor contract.

STANDARD OF REVIEW

[1,2] A judgment or final order rendered by a district court in a judicial review pursuant to the Administrative Procedure Act may be reversed, vacated, or modified by an appellate court for errors appearing on the record. *Holmes v. State*, 275 Neb. 211, 745 N.W.2d 578 (2008). When reviewing an order of a district court under the Administrative Procedure Act for errors appearing on the record, the inquiry is whether the decision conforms to the law, is supported by competent evidence, and is neither arbitrary, capricious, nor unreasonable. *Holmes v. State, supra*.

ANALYSIS

Was There Just Cause to Discipline Williams?

Williams is a member of the Nebraska Association of Public Employees Local 61 of the American Federation of State, County and Municipal Employees (NAPE). His termination of employment is governed by section 10.1 of the labor agreement between NAPE and the State, which provides in pertinent part: "The Employer shall not discipline an employee without just cause, recognizing and employing progressive discipline. When imposing progressive discipline, the nature and severity of the infraction shall be considered along with the history of discipline and performance contained in the employee's personnel file." Williams argues that there was no just cause to discipline him.

[3] "Just cause" for employee discipline is that which a reasonable employer, acting in good faith, would regard as good and sufficient reason for formally disciplining an employee, as distinguished from an arbitrary whim or caprice. *Stejskal v. Department of Admin. Servs.*, 266 Neb. 346, 665 N.W.2d 576 (2003). The Supreme Court has applied the same standard to findings regarding "good cause" for dismissal. *Id.* The district court in this case found that for nearly an hour, Williams failed to carry out an important aspect of his job. This finding is clearly supported by the record because the evidence showed that Williams admittedly failed to check the "run precaution" patients every 10 minutes from approximately 10:10 until 11 p.m., as required by LRC policy. The district court found that the foregoing gave DHHS cause to discipline Williams, a finding which conforms to the law, is supported by competent evidence, and is neither arbitrary, capricious, nor unreasonable.

Because this aspect of the job related directly to the safety and security of S.B., the other patients on the unit, and the public, the district court also found that good cause existed to terminate Williams' employment. Williams argues that the district court disregarded the fact that "absolutely no harm came to the patients under Williams' care." Brief for appellant at 20. The district court did, in fact, consider the lack of harm, but found that "[t]he nature and severity of the infraction is not measured by the harm that resulted but, rather, the risk associated with it,"

citing to *Nebraska Dept. of Correctional Servs. v. Hansen*, 238 Neb. 233, 470 N.W.2d 170 (1991). In *Hansen*, the termination of employment of a correctional officer who fell asleep while alone on duty at a penitentiary was found not to be arbitrary or capricious. Just as the Department of Correctional Services had a reasonable expectation that a security guard would remain awake while on duty, DHHS had a reasonable expectation in this case that Williams would perform the required room checks at the required intervals. See, also, *Percival v. Department of Correctional Servs.*, 233 Neb. 508, 446 N.W.2d 211 (1989) (actual harm not required to impose discipline; employee's violation of department rule, thereby compromising security, is sufficient for disciplinary action).

Williams also argues that his termination of employment was arbitrary because Kerkemeyer, with whom Williams should be compared, did not receive the same discipline. Williams cites to case law involving unlawful employment discrimination, which is not applicable in this case. In any event, there is evidence in the record to show that Kerkemeyer's absence from the ward on the evening in question was for legitimate purposes and that he did not neglect any of his duties.

The district court's finding of good cause for termination conforms to the law, is supported by competent evidence, and is neither arbitrary, capricious, nor unreasonable.

Was Finding of Fact That Williams Did Not Complete Room Checks From 8:15 Until 10 p.m. Supported by Record?

In its order, the district court also noted the following:

> Not only did Williams fail to do the required checks between 10:10 p.m. and 11:00 p.m., it appears that he failed to do any of the checks between 8:15 p.m. when Kerkemeyer took his dinner break and sometime before 10:00 p.m. when he returned from assisting staff in the girl's Unit.

The record is somewhat unclear regarding whether the rooms were checked between 8:15 and 10 p.m., although Williams testified that he performed the required room checks during this time, but did not complete the required paperwork because Kerkemeyer had the checklist in his possession. Even if the

district court's finding regarding what occurred between 8:15 and 10 p.m. was not supported by the evidence, this finding was not material to the district court's ultimate conclusion of good cause for termination, because the district court focused primarily on the lack of room checks between 10 and 11 p.m. This assignment of error is without merit.

Did District Court Err as Matter of Law in Holding That DHHS Need Not Employ Progressive Discipline?

Williams argues that the district court erred in finding that DHHS was not required to "recognize and employ" progressive discipline in this case. The district court did not make this specific finding; rather, the district court found that "section 10.1 of the Labor Agreement does not require the imposition of a sanction less than termination in all cases." We agree. The plain language of section 10.1 requires an employer to recognize and employ progressive discipline. The section goes on to state, "*When* employing progressive discipline, the nature and severity of the infraction shall be considered along with the history of discipline and performance contained in the employee's personnel file." (Emphasis supplied.) Nowhere in the contract does it state that an employer cannot choose the discipline of termination without first imposing lesser forms of discipline. Rather, section 10.1 recognizes that the nature and severity of the infraction may be such as to require immediate termination of employment.

Williams recognizes that while DHHS could terminate Williams' employment despite his lack of infractions or discipline noted in his file, the "offense would have to be exceptionally egregious." Brief for appellant at 27. The specific language of the contract imposes no such requirements on the employer. As quoted above, the specific language of the labor contract indicates that the level of progressive discipline to be imposed will depend on the nature and severity of the infraction.

There is competent evidence to support the district court's conclusion that the nature and severity of the infraction in this case supported the termination of Williams' employment rather than a lesser sanction.

CONCLUSION

The district court's finding that good cause existed to terminate Williams' employment, rather than impose a lesser sanction, was supported by competent evidence and was not arbitrary, capricious, nor unreasonable.

AFFIRMED.

STEVEN M. JACOB, APPELLANT AND CROSS-APPELLEE, V. MARGARET V. SCHLICHTMAN, FORMERLY KNOWN AS MARGARET SHUCK, SPECIAL ADMINISTRATOR OF THE ESTATE OF MELODY J. HOPPER, DECEASED, APPELLEE AND CROSS-APPELLANT.

753 N.W.2d 361

Filed June 17, 2008. No. A-07-180.

1. **Trial: Costs: Appeal and Error.** The action of the trial court in taxing costs is not reviewable unless an abuse of discretion is shown.
2. **Judgments: Verdicts.** To sustain a motion for judgment notwithstanding the verdict, the court resolves the controversy as a matter of law and may do so only when the facts are such that reasonable minds can draw but one conclusion.
3. **Statutes: Appeal and Error.** Statutory interpretation presents a question of law. When reviewing questions of law, an appellate court has an obligation to resolve the questions independently of the conclusion reached by the trial court.
4. **Statutes: Judgments: Costs.** Where it is not otherwise provided by Neb. Rev. Stat. § 25-1708 (Reissue 1995) and other statutes, costs shall be allowed of course to the plaintiff, upon a judgment in his favor, in actions for the recovery of money only, or for the recovery of specific real or personal property.
5. **Costs: Prisoners.** Transportation costs as provided for by Neb. Rev. Stat. § 25-1233 (Cum. Supp. 2006) are not the type of costs Neb. Rev. Stat. § 25-1708 (Reissue 1995) contemplates taxing to a losing party.
6. **Replevin: Damages.** In replevin, damages for the detention of the property are recoverable only in case of a return. If the property is not returned, the measure of damages is the value of the property as proved, together with lawful interest thereon from the date of the unlawful taking.
7. ____: ____. The party recovering possession of property by replevin is entitled to recover as damages any deterioration or depreciation in the value which has taken place during the wrongful detention.
8. **Replevin: Damages: Proof.** It is fundamental that the plaintiff's burden to prove the nature and amount of damages cannot be sustained by evidence which is speculative and conjectural.

9. **Insurance: Value of Goods: Auctions.** The price paid for an insurance policy at auction is not necessarily evidence of the policy's value, because sale price is often not synonymous with actual value.
10. **Value of Goods.** The purchase price of property may be taken into consideration in determining the actual value thereof for assessment purposes, together with all other relevant elements pertaining to such issue.
11. **Value of Goods: Offers to Buy or Sell: Words and Phrases.** Fair market value is the price which property will bring when offered for sale upon the open market as between a willing seller and buyer, neither being obligated to buy or sell.
12. **Replevin: Damages.** The damages for detention in a replevin action must be such as grow out of the detention and are connected with or incident to the contest over possession.
13. **Judges: Recusal.** A judge shall be disqualified if a reasonable person who knew the circumstances of the case would question the judge's impartiality under an objective standard of reasonableness, even though no actual bias or prejudice was shown.
14. **Prejudgment Interest.** The general rule is that prejudgment interest may be recovered on claims that are liquidated. A claim is liquidated if the evidence furnishes data which, if believed, makes it possible to compute the amount with exactness, without reliance upon opinion or discretion.
15. ____. Where a reasonable controversy exists as to the plaintiff's right to recover or as to the amount of such recovery, the claim is generally considered to be unliquidated and prejudgment interest is not allowed.

Appeal from the District Court for Lancaster County: JEFFRE CHEUVRONT, Judge. Affirmed.

Steven M. Jacob, pro se.

Thomas E. Zimmerman, of Jeffrey, Hahn, Hemmerling & Zimmerman, P.C., for appellee.

SIEVERS, MOORE, and CASSEL, Judges.

SIEVERS, Judge.

Steven M. Jacob is currently serving a life sentence following his conviction of first degree murder in the death of Melody J. Hopper. See *State v. Jacob*, 253 Neb. 950, 574 N.W.2d 117 (1998). Hopper's mother, Margaret V. Schlichtman, formerly Margaret Shuck, filed a damage suit against Hopper's assailant, Jacob. After summary judgment on liability was entered for Schlichtman, the matter of damages for Hopper's death was tried, and a verdict for $734,704 was rendered by a

Lancaster County jury on April 13, 1992. That judgment was reversed in *Shuck v. Jacob*, 250 Neb. 126, 548 N.W.2d 332 (1996), because Jacob's conviction that was the sole basis for the summary judgment on liability was not then final, although now it is.

Thereafter, Jacob commenced this replevin action against Schlichtman to recover items of personal property which he claims were wrongfully executed upon. The trial court ruled as a matter of law that the attachment was wrongful—a finding not challenged by Schlichtman. The matter went to trial on damages, and the jury awarded Jacob $14,805.08 in damages. However, the trial judge granted Schlichtman's motion for judgment notwithstanding the verdict against Jacob, finding that the evidence allowed a damage award of only $2,805.08. Jacob appeals this action by the trial court, as well as several other collateral issues. We affirm the trial court's reduction of Jacob's judgment against Schlichtman.

FACTUAL AND PROCEDURAL BACKGROUND

On August 2, 1989, Hopper was shot, and on August 7, she died from her wounds. On August 4, Schlichtman obtained an order for attachment of Jacob's property including the property involved in this lawsuit. The attachment order included a life insurance policy and shares of stock in Legacy Technologies Ltd. (Legacy). Jacob's life insurance policy and the shares of stock were sold at a public auction on June 9, 1992, for $6,000 each to Schlichtman. The insurance policy was later cashed in by Schlichtman for $2,805.08.

However, the wrongful death judgment was reversed on appeal, and Jacob moved the district court to vacate the sale of his insurance policy and stock. The district court did so. Jacob then filed a replevin action, seeking the return of his property and damages. Jacob obtained partial summary judgment on the issue of liability, and the only issue tried in this case was the matter of damages. Therefore, we do not discuss any liability issues.

Prior to the trial on damages, Jacob requested a transport order, because he was (and is) incarcerated. Jacob was required

to pay the transportation costs, $548, and he now seeks to have such costs paid by Schlichtman.

At trial, the jury found in favor of Jacob, awarding him damages of $8,805.08 for his life insurance policy and $6,000 for his stock shares. On October 19, 2006, judgment was entered for Jacob for $14,805.08.

Jacob filed a motion to alter or amend, requesting prejudgment interest on his award; he also filed a motion for his costs. Schlichtman filed a motion for judgment notwithstanding the verdict, claiming the evidence was insufficient to support the jury's verdict. The trial court reduced Jacob's award to $2,805.08 and awarded him 12 percent prejudgment interest on that judgment beginning June 9, 1992, the date the policy was sold at public auction to Schlichtman. Jacob timely appealed; Schlichtman cross-appealed.

ASSIGNMENTS OF ERROR

Jacob assigns the following errors to the district court: (1) requiring him to pay his own transportation costs, (2) not awarding him costs, (3) granting Schlichtman's motion for judgment notwithstanding the verdict, and (4) being biased against him. In her cross-appeal, Schlichtman asserts that the district court's award of prejudgment interest was error.

STANDARD OF REVIEW

[1] The action of the trial court in taxing costs is not reviewable unless an abuse of discretion is shown. *Hein v. M & N Feed Yards, Inc.*, 205 Neb. 691, 289 N.W.2d 756 (1980).

[2] To sustain a motion for judgment notwithstanding the verdict, the court resolves the controversy as a matter of law and may do so only when the facts are such that reasonable minds can draw but one conclusion. *Eyl v. Ciba-Geigy Corp.*, 264 Neb. 582, 650 N.W.2d 744 (2002).

[3] Statutory interpretation presents a question of law. When reviewing questions of law, an appellate court has an obligation to resolve the questions independently of the conclusion reached by the trial court. *Whipps Land & Cattle Co. v. Level 3 Communications*, 265 Neb. 472, 658 N.W.2d 258 (2003).

ANALYSIS

Jacob's Costs.

[4] Jacob asserts that the district court should have awarded him his costs based on Neb. Rev. Stat. § 25-1708 (Reissue 1995). Section 25-1708 provides the following: "Where it is not otherwise provided by this and other statutes, costs shall be allowed of course to the plaintiff, upon a judgment in his favor, in actions for the recovery of money only, or for the recovery of specific real or personal property."

Jacob prevailed in his action to recover in this replevin action. Therefore, he is entitled to costs, and in the district court's order of January 23, 2007, costs were in fact awarded to him.

[5] Jacob's real complaint is that his transportation costs of slightly over $500 were not part of the court's award of costs. Jacob argues that Neb. Rev. Stat. § 25-1233 (Cum. Supp. 2006) requires Schlichtman to pay for his transportation costs. However, Jacob's transportation costs as provided for by § 25-1233 are not the type of costs § 25-1708 contemplates taxing to the losing party, because Jacob incurred such costs under § 25-1708 solely to secure his attendance at trial in his capacity as a party to the lawsuit. Jacob's transportation costs arise because he is incarcerated and must be supervised by personnel from the Department of Correctional Services if he is to travel to and attend a trial. Jacob cannot get himself to the courthouse, because he is an incarcerated felon, meaning that he must be physically transported by prison authorities and that the public must be protected and escape prevented. In other words, the transportation and security costs at issue arise because of Jacob's status as a convicted felon.

Jacob's claim that these costs should be taxed to Schlichtman is akin to a plaintiff's issuing a subpoena to himself or herself and then relying upon such subpoena, seeking to have fees and mileages for his or her own attendance at trial taxed against the opposing party. Such a result or procedure has no support in Nebraska law. Therefore, § 25-1708 provides no basis for taxing the costs of Jacob's transportation order to Schlichtman.

Although Jacob argues that § 25-1233 requires Schlichtman to pay for his transportation costs, § 25-1233 simply ensures

that the Department of Correctional Services will be paid for the expense of transporting Jacob to trial, and does not address who, as between the parties to litigation, is responsible for Jacob's transportation costs. Section 25-1233 provides as follows:

> (1) A person confined in any prison in this state shall, by order of any court of record, be produced for oral examination in the county where he or she is imprisoned. In all other cases his or her examination must be by deposition.
>
> (2) In civil matters, the court shall notify the Department of Correctional Services of any production order, in which a confined person is the subject, at least fifteen days before the required production. The court shall allow the department to present evidence relating to public safety and security concerns associated with the production of the confined person prior to the required production date. The party who moved for the production order shall be allowed to respond. Based on evidence presented, the court may rescind its production order. If the confined person is produced pursuant to court order, the party who moved for the production order shall pay to the department the actual cost of security and transportation arrangements incurred by the department related to such production.

Jacob claims that although he requested the transportation order, he should not be required to pay for the costs of his transportation, because he did not testify in his own behalf in his case; rather, it was Schlichtman who called him to testify in her case. However, the fact that Schlichtman took advantage of the fact that Jacob had arranged his presence in the courtroom and then called him as her witness does not change the fact that this statute merely ensures that the Department of Correctional Services is paid. The statute says nothing about who is ultimately responsible for such costs when the trial court gets to the point of taxing costs as between parties. As said above, the costs which Jacob seeks to impose on Schlichtman arise solely from the fact that he is a convicted felon and wanted to be physically present in court—which, given his status as a prisoner, involves extra expense only because of the crimes he committed. It would be grossly unfair to impose those costs on Schlichtman.

Thus, the trial court did not abuse its discretion in the taxation of costs.

Judgment Notwithstanding Verdict.

Jacob argues that the district court erred by sustaining Schlichtman's motion for judgment notwithstanding the verdict. We affirm the district court's decision, because the only competent evidence of the value of the life insurance policy is that it was worth $2,805.08 and there was no evidence that Schlichtman caused any deterioration in the value of the Legacy stock.

It is clear that the jury determined damages by adding the amounts that Schlichtman paid at auction for the insurance policy ($6,000) and stock ($6,000) to the amount that Schlichtman received when she cashed the insurance policy in ($2,805.08) to arrive at the total award of $14,805.08. However, this is not the proper measure of damages in a replevin action.

[6-8] In replevin, damages for the detention of the property are recoverable only in case of a return. If the property is not returned, the measure of damages is the value of the property as proved, together with lawful interest thereon from the date of the unlawful taking. See *Oak Creek Valley Bank v. Hudkins*, 115 Neb. 628, 214 N.W. 68 (1927). The party recovering possession of the property is entitled to recover as damages any deterioration or depreciation in the value which has taken place during the wrongful detention. *White Motor Credit Corp. v. Sapp Bros. Truck Plaza, Inc.*, 197 Neb. 421, 249 N.W.2d 489 (1977), *overruled on other grounds, United States Nat. Bank v. Atlas Auto Body*, 214 Neb. 597, 335 N.W.2d 288 (1983). "It is fundamental that the plaintiff's burden to prove the nature and amount of damages cannot be sustained by evidence which is speculative and conjectural." *Dawson v. Papio Nat. Resources Dist.*, 206 Neb. 225, 232, 292 N.W.2d 42, 47 (1980).

[9,10] Here, the best evidence of the value of the life insurance policy is the amount it was cashed out for, $2,805.08. Jacob produced evidence that the death benefit of the insurance policy was $10,000, but this is not a measure of the life insurance policy's value on the date it was seized, but, rather, of the contractual death benefit. While the death benefit could possibly have some relationship to the policy's value on the

date it was seized if it were combined with some type of expert testimony explaining that relationship, there was no such evidence. Further, the price paid for the policy at auction, $6,000, is also not necessarily evidence of the policy's value, because sale price is often not synonymous with actual value. See, *Neill v. McGinn*, 175 Neb. 369, 122 N.W.2d 65 (1963) (value of automobile could not be determined by its purchase price); *Lancaster Cty. Bd. of Equal. v. Condev West, Inc.*, 7 Neb. App. 319, 581 N.W.2d 452 (1998) (value of real property could not be determined by its purchase price). But see *Forney v. Box Butte Cty. Bd. of Equal.*, 7 Neb. App. 417, 582 N.W.2d 631 (1998) (purchase price of property may be taken into consideration in determining the actual value thereof for assessment purposes, together with all other relevant elements pertaining to such issue).

[11] Fair market value is the price which property will bring when offered for sale upon the open market as between a willing seller and buyer, neither being obligated to buy or sell. *Smith v. Papio-Missouri River NRD*, 254 Neb. 405, 576 N.W.2d 797 (1998). Here, when the buyer holds a judgment against the property's owner for more than $700,000, and she is bidding against only the property owner's mother for the property, the sales price is simply not the fair market value of the property, remembering that Schlichtman ends up with the money she pays for the item attached and sold at auction. In short, what Schlichtman paid for the policy is not evidence of its fair market value.

The only evidence that establishes the value of Jacob's insurance policy at the time it was seized from him in 1989 is what its cash value was in 1992, $2,805.08. In short, the evidence before the jury would support only a finding that the policy's value was $2,805.08. Therefore, the district court correctly granted Schlichtman's motion for judgment notwithstanding the verdict with respect to the insurance policy, and we affirm that finding.

[12] With regard to the stock, the shares were returned to Jacob, so he can recover damages only in the event that such shares deteriorated in value between the time they were taken from him and the time they were returned. While there is evidence that the stock deteriorated in value between the time

it was seized and the time it was returned, "'the damages for detention must be such as grow out of the detention and are connected with or incident to the contest over possession.'" See *Morfeld v. Bernstrauch*, 216 Neb. 234, 241, 343 N.W.2d 880, 884 (1984). Here, there is no evidence upon which a jury could find that Schlichtman caused the deterioration of the stock's value or that such deterioration grew out of or was connected with the contest over its possession. Rather, the evidence strongly suggests, if not compels, the conclusion that the stock's value (whatever it was when attached, a matter upon which Jacob introduced no evidence beyond the amount of Schlichtman's bid) was adversely affected by the fact that Jacob was the majority owner and principal employee of Legacy. Because there is no evidence that any deterioration in the value of the stock "grew out of the detention" by Schlichtman, Jacob cannot recover for such deterioration, and therefore the trial court properly granted Schlichtman's motion for judgment notwithstanding the verdict concerning the stock.

Would a Reasonable Person Have Concluded That the Trial Judge Was Biased?

Jacob claims that the trial judge took on a role of advocate for Schlichtman when, in an order ruling on a motion for summary judgment by Jacob, the judge wrote, "If Jacob consents, this court could find that the appropriate date from which to commence the interest is September 16, 1992 and the court would enter judgment in his favor in the amount of $2,805.08 with interest . . . ." Jacob suggests this showed partiality on the part of the judge. However, we find that a reasonable person would not have concluded that the trial judge was biased because of this order.

The level of proof needed to establish that an arbitrator was biased was addressed in *Dowd v. First Omaha Sec. Corp.*, 242 Neb. 347, 495 N.W.2d 36 (1993). The *Dowd* court established that the partiality of an arbitrator was established when a "'reasonable person would have to conclude that an arbitrator was partial to one party to the arbitration.'" 242 Neb. at 358, 495 N.W.2d at 43. The court rejected the notion that partiality could be proved by the mere "'appearance of bias'" and, instead,

adopted the "reasonable person" test. *Id.* The court noted that judges and arbitrators were both subject to the same ethical standards and proceeded to address whether an arbitrator's failure to disclose a possible conflict of interest proved bias or prejudice against one party.

[13] *State v. Pattno*, 254 Neb. 733, 739-40, 579 N.W.2d 503, 507-08 (1998), states:

> The federal courts have consistently applied the standard that we adopted in *Dowd* for determination of whether a judge was biased against a defendant. Pursuant to 28 U.S.C. § 455(a) (1994), a judge shall be disqualified if a reasonable person who knew the circumstances of the case would question the judge's impartiality under an objective standard of reasonableness, even though no actual bias or prejudice was shown. See *Renteria v. Schellpeper*, 936 F. Supp. 691 (D. Neb. 1996). . . .
>
> The reasonable person test adopted by this court in *Dowd* is a rational means of determining whether a judge is biased against a defendant.

Here, a reasonable person would not conclude that the trial judge was biased. It is clear from his order that he was simply attempting to facilitate a resolution of the proceedings and to avoid further proceedings, which only suggests an appropriate interest on his part in both the conservation of judicial resources and the timely resolution of the parties' disputes. Jacob's allegation of judicial bias is without merit.

Did District Court Err in Awarding Jacob Prejudgment Interest?

The district court correctly awarded prejudgment interest because Jacob's damages were determinable with reasonable certainty.

[14,15] The general rule is that prejudgment interest may be recovered on claims that are liquidated. "'"A claim is liquidated if the evidence furnishes data which, if believed, makes it possible to compute the amount with exactness, without reliance upon opinion or discretion."'" *First Data Resources, Inc. v. Omaha Steaks Int., Inc.*, 209 Neb. 327, 335, 307 N.W.2d 790, 794 (1981). Where reasonable controversy exists as to the plaintiff's

right to recover or as to the amount of such recovery, the claim is considered to be unliquidated and prejudgment interest is not allowed. *Langel Chevrolet-Cadillac v. Midwest Bridge*, 213 Neb. 283, 329 N.W.2d 97 (1983).

Schlichtman claims that the damages in this case were not liquidated, because they could not be computed with exactness; however, for the same reason that Schlichtman's motion for judgment notwithstanding the verdict was rightfully successful—because reasonable minds could arrive at only one conclusion regarding damages with respect to the insurance policy—Jacob's damages were liquidated on the policy. The only credible evidence of Jacob's damages is the cash value Schlichtman received for his life insurance policy. That amount was determinable with exactness, and Jacob's entitlement to damages was determined as a matter of law on a motion for summary judgment, a determination not challenged on appeal. Therefore, because liability was not in dispute, nor was the amount of damages on the life insurance policy, prejudgment interest was appropriate in this case.

CONCLUSION

For the reasons stated above, we affirm the decision of the district court.

AFFIRMED.

GERALD TLAMKA, APPELLANT, V.
NICHOLAS PARRY ET AL., APPELLEES.
751 N.W.2d 664

Filed June 17, 2008. No. A-07-412.

1. **Jurisdiction.** Subject matter jurisdiction is a question of law for the court.
2. **Judgments: Appeal and Error.** When reviewing questions of law, an appellate court has an obligation to resolve the questions independently of the conclusion reached by the trial court.
3. **Jurisdiction: Words and Phrases.** Subject matter jurisdiction is a court's power to hear a case.
4. **Jurisdiction.** Lack of subject matter jurisdiction may be raised at any time by any party or by the court sua sponte.

5. **Jurisdiction: Appeal and Error.** If the court from which an appeal was taken lacked jurisdiction, the appellate court acquires no jurisdiction.
6. **Administrative Law: Jurisdiction: Appeal and Error.** Where a district court has statutory authority to review an action of an administrative agency, the district court may acquire jurisdiction only if the review is sought in the mode and manner and within the time provided by statute.
7. ____: ____: ____. The filing of the petition and the service of summons are the two actions that are necessary to establish jurisdiction pursuant to the Administrative Procedure Act.
8. **Administrative Law: Parties: Appeal and Error.** An agency which is charged with the responsibility of protecting the public interest, as distinguished from determining the rights of two or more individuals in a dispute before such agency, is a necessary or indispensable party in a judicial review of an order of an administrative agency.
9. **Statutes.** A court must attempt to give effect to all parts of a statute, and if it can be avoided, no word, clause, or sentence will be rejected as superfluous or meaningless.
10. **Judgments: Appeal and Error.** Where the record adequately demonstrates that the decision of a trial court is correct, although such correctness is based on a ground or reason different from that assigned by the trial court, an appellate court will affirm.

Appeal from the District Court for Lancaster County: JOHN A. COLBORN, Judge. Affirmed.

Gerald Tlamka, pro se.

Jon Bruning, Attorney General, and Matthew A. Works for appellees.

SIEVERS, MOORE, and CASSEL, Judges.

CASSEL, Judge.

INTRODUCTION

After an administrative tribunal denied custodial reclassification to inmate Gerald Tlamka, he sought judicial review under the Administrative Procedure Act (APA), Neb. Rev. Stat. §§ 84-901 to 84-920 (Reissue 1999 & Cum. Supp. 2006), initially naming as defendants only certain employees of the Nebraska Department of Correctional Services (DCS). Because Tlamka failed to timely include DCS—a necessary party under the APA—the district court lacked jurisdiction and we, in turn, lack jurisdiction of the instant appeal.

BACKGROUND

Tlamka was convicted in 1994 of felony motor vehicle homicide and driving under a revoked license and was sentenced to imprisonment in the custody of DCS. Tlamka anticipates mandatory release in 2011. In June 2006, Tlamka applied for and was denied reclassification from "minimum custody" to "community custody." Tlamka pursued all remaining administrative appeals, which were exhausted by an order rendered on July 20. The precise date of service of the final administrative decision does not appear in our record. However, Tlamka's petition to the district court admitted that the DCS order was received on July 22. It necessarily follows that service was accomplished sometime between July 20 and 22, which is sufficiently precise to address the issue before us.

On August 21, 2006, Tlamka filed a petition for judicial review under the APA, naming as defendants only Nicholas Parry, Brad Exstrom, Dennis Bakewell, Frank Hopkins, and Robert Houston, all of whom are employees of DCS. On November 20, Tlamka filed an amended petition adding DCS as an additional defendant. On January 17, 2007, the employees filed a motion to dismiss, based upon Neb. Ct. R. of Pldg. in Civ. Actions 12(b)(1) and (6) (rev. 2003). On February 14, the district court conducted a telephonic hearing, at which it received no evidence, but heard arguments and took the matter under advisement.

The court's judgment, styled as an order, was entered on March 29, 2007. The court determined that it lacked jurisdiction over Tlamka's APA appeal, reasoning that Tlamka had no legal rights or privileges, constitutional or otherwise, to a specific custody classification and that therefore, Tlamka presented no "[c]ontested case" within the meaning of § 84-901(3). The court sustained the motion to dismiss.

Tlamka timely appeals.

ASSIGNMENT OF ERROR

Tlamka's sole assignment of error asserts that the district court erred in dismissing the action for lack of jurisdiction.

STANDARD OF REVIEW

[1,2] Subject matter jurisdiction is a question of law for the court. *Ptak v. Swanson*, 271 Neb. 57, 709 N.W.2d 337 (2006). When reviewing questions of law, an appellate court has an obligation to resolve the questions independently of the conclusion reached by the trial court. *Fokken v. Steichen*, 274 Neb. 743, 744 N.W.2d 34 (2008).

ANALYSIS

The appellees' brief raises a new jurisdictional claim—asserting that Tlamka's failure to include DCS in the initial petition for judicial review constitutes a defect depriving the district court of subject matter jurisdiction, which in turn deprives this court of jurisdiction. We agree.

[3-5] We first recall some general principles regarding subject matter jurisdiction. Subject matter jurisdiction is a court's power to hear a case. *State ex rel. Lamm v. Nebraska Bd. of Pardons*, 260 Neb. 1000, 620 N.W.2d 763 (2001). Lack of subject matter jurisdiction may be raised at any time by any party or by the court sua sponte. *Betterman v. Department of Motor Vehicles*, 273 Neb. 178, 728 N.W.2d 570 (2007). If the court from which an appeal was taken lacked jurisdiction, the appellate court acquires no jurisdiction. *Anderson v. Houston*, 274 Neb. 916, 744 N.W.2d 410 (2008).

[6] Where a district court has statutory authority to review an action of an administrative agency, the district court may acquire jurisdiction only if the review is sought in the mode and manner and within the time provided by statute. *Nebraska Dept. of Health & Human Servs. v. Weekley*, 274 Neb. 516, 741 N.W.2d 658 (2007); *Essman v. Nebraska Law Enforcement Training Ctr.*, 252 Neb. 347, 562 N.W.2d 355 (1997). In the case before us, we must determine whether the district court lacked subject matter jurisdiction because Tlamka failed to seek review in such mode and manner and within such time as provided by statute.

[7] The filing of the petition and the service of summons are the two actions that are necessary to establish jurisdiction pursuant to the APA. See, *Essman v. Nebraska Law Enforcement Training Ctr., supra*; *James v. Harvey*, 246 Neb. 329, 518 N.W.2d 150 (1994).

As this court explained in *Northern States Beef v. Stennis*, 2 Neb. App. 340, 509 N.W.2d 656 (1993), in order to perfect an appeal under the APA, the party instituting the proceedings for review must file a petition in the district court for the county where the action is taken within 30 days after the service of the final decision by the agency, and cause summons to be served within 30 days of the filing of the petition.

DCS was a necessary and indispensable party to the proceeding for judicial review. Section 84-917(2)(a) prescribes the parties which must be included in the petition:

> All parties of record shall be made parties to the proceedings for review. If an agency's only role in a contested case is to act as a neutral factfinding body, the agency shall not be a party of record. In all other cases, the agency shall be a party of record.

[8] An agency which is charged with the responsibility of protecting the public interest, as distinguished from determining the rights of two or more individuals in a dispute before such agency, is a necessary or indispensable party in a judicial review of an order of an administrative agency. See, *Beatrice Manor v. Department of Health*, 219 Neb. 141, 362 N.W.2d 45 (1985); *Leach v. Dept. of Motor Vehicles*, 213 Neb. 103, 327 N.W.2d 615 (1982). DCS is charged with protecting the public interest from persons convicted of crime, and as part of this responsibility, it classifies offenders. Thus, Tlamka's petition for review must make DCS a party. The initial petition did not.

The statutory requirement of timeliness requires that necessary parties to an APA proceeding be included in a timely petition. Section 84-917(2)(a) requires the petition to be filed with the district court "within thirty days after the service of the final decision by the agency." We assume that Tlamka's allegation of service on July 22, 2006, was correct and, thus, that the initial petition filed on August 21 was timely. However, the initial petition failed to timely designate DCS as a party.

This jurisdictional flaw becomes even more apparent when we consider the other requirement for district court jurisdiction—service of the summons within 30 days of filing the petition. Section 84-917(2)(a) states, "Summons shall be served within thirty days of the filing of the petition . . . ." While our

record does not include the summonses, it is obvious that no summons could have been issued to DCS until it had been made a party, which did not occur until November 20, 2006. Section 84-917(2)(a) required the summons to be served by September 20 (30 days after the petition was filed on August 21). The record demonstrates that no summons could have been served upon DCS within 30 days of the filing of the petition.

[9] Tlamka's reply brief wholly fails to respond to DCS' new jurisdictional argument. While he might have argued that the summons on DCS was served within 30 days from the filing of the amended petition, the flaw in such argument is palpable—it would eviscerate the requirement that the petition be filed within 30 days from the date of service of the agency decision. A court must attempt to give effect to all parts of a statute, and if it can be avoided, no word, clause, or sentence will be rejected as superfluous or meaningless. *Zach v. Nebraska State Patrol*, 273 Neb. 1, 727 N.W.2d 206 (2007).

CONCLUSION

[10] Tlamka failed to seek district court review in the mode and manner and within the time provided by statute. By omitting DCS as a party defendant in the initial petition, he failed to timely petition for review as to a necessary and indispensable party. The district court lacked subject matter jurisdiction of the APA proceeding, and the court so held, albeit upon different reasoning. We need not consider whether the court's explanation was correct. Where the record adequately demonstrates that the decision of a trial court is correct, although such correctness is based on a ground or reason different from that assigned by the trial court, an appellate court will affirm. *Jessen v. Malhotra*, 266 Neb. 393, 665 N.W.2d 586 (2003). We do so.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. SHAWN K. RATHJEN, APPELLANT.

751 N.W.2d 668

Filed June 17, 2008. No. A-07-682.

1. **Motions to Suppress: Investigative Stops: Warrantless Searches: Probable Cause: Appeal and Error.** A trial court's ruling on a motion to suppress, apart from determinations of reasonable suspicion to conduct investigatory stops and probable cause to perform warrantless searches, will be upheld unless its findings of fact are clearly erroneous. In making this determination, an appellate court does not reweigh the evidence or resolve conflicts in the evidence, but, rather, recognizes the trial court as the finder of fact and takes into consideration that it observed the witnesses.
2. **Constitutional Law: Search and Seizure.** Both the Fourth Amendment to the U.S. Constitution and article I, § 7, of the Nebraska Constitution protect against unreasonable searches and seizures by the government.
3. ____: ____. Searches conducted outside the judicial process, without prior approval by a judge or magistrate, are per se unreasonable under the Fourth Amendment, subject only to a few specifically established and well-delineated exceptions.
4. **Constitutional Law: Arrests: Warrantless Searches: Probable Cause: Motor Vehicles.** The recognized exceptions to the Fourth Amendment's warrant requirement as applied to automobiles include probable cause, exigent circumstances, consent, search incident to arrest, inventory search, and plain view.
5. **Warrantless Searches: Proof.** The State has the burden to prove that one of the circumstances substantiating the reasonableness of a warrantless search was present during a warrantless search.
6. **Search and Seizure.** In order for a consent to search to be effective, it must be a free and unconstrained choice and not the product of a will overborne.
7. ____. In order to determine whether a person's consent to search was voluntarily given, a court must review the totality of the circumstances.
8. ____. A consensual search by its very definition is circumscribed by the extent of the permission given, as determined by the totality of the circumstances.
9. **Constitutional Law: Search and Seizure: Police Officers and Sheriffs.** The standard for measuring the scope of a suspect's consent under the Fourth Amendment is that of objective reasonableness—what would the typical reasonable person have understood by the exchange between the officer and the suspect?
10. **Search and Seizure.** Whether there were any limitations placed on the consent given and whether the search conformed to those limitations are questions of fact to be determined by the totality of the circumstances.
11. ____. Whether one who consents later objects to an ongoing search is a significant inquiry determining whether there is a limitation placed on the scope of the consent that has been granted.

Appeal from the District Court for York County: ALAN G. GLESS, Judge. Affirmed.

Eric J. Williams, York County Public Defender, for appellant.

Jon Bruning, Attorney General, and George R. Love for appellee.

Sievers, Moore, and Cassel, Judges.

Cassel, Judge.

INTRODUCTION

Following the conviction and sentencing of Shawn K. Rathjen for possession of methamphetamine, he appeals, challenging only the order overruling his pretrial motion to suppress evidence obtained during a warrantless search of a locked toolbox located in the bed of his pickup truck. We conclude that the district court's finding that Rathjen consented to the search of his vehicle and implicit finding that such consent extended to the search of the locked toolbox were not clearly erroneous. We therefore affirm.

BACKGROUND

On March 18, 2006, an officer stopped Rathjen for committing a traffic infraction and arrested him after a search of his vehicle revealed that he was in possession of methamphetamine. Rathjen thereafter was charged by information with possession of a controlled substance with intent to distribute or deliver, a Class IC felony, and entered a plea of not guilty. He later filed an amended motion to suppress. He requested an order suppressing all evidence acquired from the search of his vehicle, alleging that the stop and search violated the Fourth Amendment because (1) there was no valid reason for the traffic stop, or for the continued detention and seizure of Rathjen after he was issued a traffic citation; (2) Rathjen did not freely and voluntarily consent to the warrantless search of his vehicle, which was otherwise tainted by the unlawful detention; and (3) law enforcement officers exceeded the scope of any consent to search by searching a locked container which was outside of the vehicle and for which Rathjen had a reasonable expectation of privacy, without obtaining additional consent to do so. Rathjen

also asserted that his rights under the 5th and 14th Amendments were violated.

On May 1 and 3, 2006, the court held a hearing on the amended motion to suppress where the following testimony was adduced: Robert A. Penner, a deputy sheriff for York County, Nebraska, testified that Rathjen was arrested on March 18. His testimony demonstrated that he has extensive training and experience in conducting drug investigations. He testified that shortly after 2 a.m. on March 18, he was patrolling on U.S. Highway 34 in York County. He testified that he was traveling east when he passed a pickup truck that was traveling west. After he passed the pickup truck, he looked in his rearview mirror and noticed that one of its taillights was not illuminated. He thereafter turned his patrol car around, activated his emergency lights, and stopped the pickup truck.

Penner testified that anytime that he activates his emergency lights, a video camera automatically begins recording. The stop of Rathjen's vehicle was recorded, and the recording is included in the evidentiary record.

Penner approached the driver of the vehicle, whom he identified as Rathjen, and advised Rathjen that he had been stopped because one of his vehicle's taillights was out. Rathjen responded by looking at his female passenger and exclaiming, "Damn." Rathjen then commented that he had recently fixed one of the taillights.

Penner requested and received from Rathjen his operator's license, vehicle registration, and a vehicle insurance card. The insurance card was expired. Penner then asked Rathjen some routine questions and learned that Rathjen's destination was Clarks, Nebraska, to pick up his children. Penner opined that Clarks was approximately a 35-minute drive from the scene of the traffic stop.

Penner returned to his patrol car, where he checked the status of Rathjen's operator's license and vehicle insurance, and ordered a criminal history check on Rathjen. He was unable to obtain verification that the vehicle was insured, but was notified that Rathjen had previous charges for possession of marijuana and methamphetamine.

Penner returned to Rathjen's vehicle, ordered Rathjen to exit the vehicle, and showed Rathjen "[t]he rear of the vehicle." He issued Rathjen a citation for failure to present proof of insurance and a defect ticket for the taillight violation. Penner testified that he had not arrested Rathjen at that point. After Rathjen signed the citation, Penner advised Rathjen that "he was good to go, basically that he could leave," but as Rathjen began to leave, Penner asked Rathjen for permission to ask him another question. According to Penner, in response, Rathjen "stopped and stood there" and said "something to the effect of yes." Penner did not tell Rathjen that he was not free to leave at that point. Penner asked Rathjen if he had anything illegal in his vehicle, to which Rathjen responded that he did not and that "'[t]hat was a long time ago.'" Rathjen elaborated that he had been in trouble in the past for possession of marijuana and methamphetamine. Penner then asked Rathjen if he could search his vehicle, to which Rathjen responded that "it was fine." Penner also requested and received consent to conduct a pat-down search of Rathjen's person. He discovered nothing illegal in the pat-down search.

Penner then asked the female passenger to exit the vehicle. She complied with Penner's request and exited the vehicle carrying her purse, which she appeared to Penner to be trying to conceal under her coat. Penner asked for and received permission to search her purse. Penner discovered a glass pipe with a "whitish film inside of it" that he believed had been used to smoke methamphetamine. He also found a "plastic self-sealing baggie" containing a "crystal white substance" that appeared to Penner to be methamphetamine. He arrested the passenger, at which time Rathjen commented that "she needed to quit doing that."

Penner then searched the passenger compartment of Rathjen's pickup truck. He testified that he was "looking for any place that [he] felt it could [sic] be able to conceal any type of methamphetamine or contraband," but did not find anything in the passenger compartment.

He then searched a toolbox located in the bed of the pickup truck. The bed of the pickup truck did not have "any sort of camper or shell" on it. The toolbox was positioned against the

passenger compartment and extended the entire width of the pickup truck's bed. Although Rathjen testified that he had a "locked container attached to [his] vehicle," it is unclear from the record whether the toolbox was permanently affixed to the bed of the pickup truck. However, the nature of the toolbox makes it likely that it remained in the bed of the pickup truck at all times.

Penner testified that the toolbox was locked and that he opened it using the toolbox key on the keyring hanging from the key in the ignition. During his search of the toolbox, Penner discovered a black bag that appeared to him to be a shaving kit. He searched inside the unlocked bag and discovered some mail addressed to Rathjen, a couple of electronic scales, a cigar in a glass container, a glass pipe, three empty self-sealing baggies, and a bag containing a "large amount of a crystal substance that [Penner] believed to be crystal meth[amphetamine]." Rathjen was thereafter placed under arrest, and he commented that "'[t]hat was her bag that you found.'"

On cross-examination, Penner testified that he asked for Rathjen's consent to search his vehicle because he had a "hunch" that Rathjen was engaged in criminal activity. Penner stated that before he requested consent for the search, he did not see or sense any illegal activity or the presence of any contraband, but did note suspicious activity. He testified that the suspicious activity he noticed included Rathjen's "tone of voice" and the "urgency" with which he looked at his female passenger after he learned that he had a taillight out. He also testified that Rathjen appeared "fairly nervous" for just having a taillight out.

Penner admitted that he did not ask Rathjen for additional consent before searching the toolbox. Rathjen did not assist in the search, and Penner testified that Rathjen was neither present nor within earshot when he searched the toolbox. When asked if he had any reason to believe that Rathjen had consented to the search of the toolbox, Penner responded, "He didn't say I couldn't."

Sgt. Don Copeland, a deputy sheriff for York County, testified that he arrived on the scene shortly after Rathjen consented to the search of his vehicle and right before Penner arrested the female passenger. Copeland performed a pat-down search of

Rathjen upon Penner's request, but did not find anything out of the ordinary. Copeland stood behind Rathjen's vehicle with Rathjen while Penner searched the passenger compartment of the vehicle. Rathjen did not indicate to Copeland at any point that he wanted to withdraw his consent to the search. After some time, Rathjen asked if he could get his coat, which Penner gave to him. It was cold out that night, so Copeland asked Rathjen if he wanted to sit in Copeland's patrol car. Rathjen accepted the invitation, and both Rathjen and Copeland sat in Copeland's patrol car until Penner told Copeland to arrest Rathjen. At that point, Copeland and Rathjen exited the car and Rathjen was placed under arrest.

On cross-examination, Copeland testified that he and Rathjen entered his patrol car prior to Penner's search of the toolbox. He testified that his patrol car was located behind Penner's patrol car, which was parked behind Rathjen's vehicle. He estimated that his patrol car was "three car lengths" behind Rathjen's pickup truck during the search.

Rathjen testified that he did not believe he was free to leave after Penner issued him a citation and returned his operator's license, because Penner almost immediately thereafter asked him more questions that he believed he was required to answer. He testified that he felt pressure to remain. He admitted that he consented to the search of his vehicle, but stated that he believed he did not have the right to deny consent. He denied giving Penner permission to search the locked toolbox, which he expected was a private area. He testified that he was in Copeland's patrol car when Penner searched the toolbox and that he was not in a position where he could have objected to such search.

On July 28, 2006, the district court entered a six-page order denying Rathjen's motion to suppress. The court stated that it believed Penner's testimony on all factually contested points. The court determined that Penner had probable cause for the traffic stop because Rathjen's vehicle had one taillight that was not showing red as required by statute. The court also determined that Penner's initial questions and requests for information were valid officer activities. The court determined that Rathjen was not restrained after he received the citation and defect ticket.

With regard to consent for the search, the district court determined that no facts indicated that Penner forced Rathjen to comply with the vehicle search request. The court found that Penner did not know that the toolbox was locked when he asked for consent to search the vehicle and did not seek separate consent to search the toolbox. The court also found that Rathjen did not limit the coverage of his consent for the search. The court concluded that Rathjen gave valid consent for the search of his pickup truck and toolbox and that regardless of the consent, Penner had "sufficient probable cause to search the pickup and locked toolbox without consent."

The case proceeded to a jury trial. On March 14, 2007, Rathjen was found guilty of possession of methamphetamine and sentenced to 3 years' probation.

Rathjen timely appeals.

ASSIGNMENT OF ERROR

Rathjen's sole assignment of error is that the district court erred in overruling his motion to suppress.

STANDARD OF REVIEW

[1] A trial court's ruling on a motion to suppress, apart from determinations of reasonable suspicion to conduct investigatory stops and probable cause to perform warrantless searches, will be upheld unless its findings of fact are clearly erroneous. In making this determination, an appellate court does not reweigh the evidence or resolve conflicts in the evidence, but, rather, recognizes the trial court as the finder of fact and takes into consideration that it observed the witnesses. *State v. Tucker*, 262 Neb. 940, 636 N.W.2d 853 (2001); *State v. McGinnis*, 8 Neb. App. 1014, 608 N.W.2d 605 (2000).

ANALYSIS

[2-5] Both the Fourth Amendment to the U.S. Constitution and article I, § 7, of the Nebraska Constitution protect against unreasonable searches and seizures by the government. *State v. Konfrst*, 251 Neb. 214, 556 N.W.2d 250 (1996). Searches conducted outside the judicial process, without prior approval by a judge or magistrate, are per se unreasonable under the Fourth Amendment, subject only to a few specifically established and

well-delineated exceptions. *Id*. The recognized exceptions to the Fourth Amendment's warrant requirement as applied to automobiles include probable cause, exigent circumstances, consent, search incident to arrest, inventory search, and plain view. *State v. Konfrst, supra*. The State has the burden to prove that one of these circumstances was present during a warrantless search. *State v. Hisey*, 15 Neb. App. 100, 723 N.W.2d 99 (2006).

Rathjen asserts that none of the exceptions to the warrant requirement were present during Penner's search of his toolbox. However, he focuses his argument on three of the exceptions, asserting that the search (1) was not conducted pursuant to valid consent, (2) was not conducted incident to an arrest, and (3) was not justified by the existence of probable cause. Because we ultimately conclude that the search of the toolbox was conducted pursuant to Rathjen's valid consent, we need not consider any of the other exceptions.

[6,7] To address Rathjen's argument regarding consent, we recall the legal standards governing the issue. In order for a consent to search to be effective, it must be a free and unconstrained choice and not the product of a will overborne. See *State v. Ready*, 252 Neb. 816, 565 N.W.2d 728 (1997). The consent must be given voluntarily and not as the result of duress or coercion, whether express, implied, physical, or psychological. *Id*. In order to determine whether a person's consent to search was voluntarily given, a court must review the totality of the circumstances. *Id*. As stated above, the findings of fact in this respect will not be set aside on appeal unless they are clearly erroneous. See *State v. Graham*, 241 Neb. 995, 492 N.W.2d 845 (1992).

The district court made several factual findings regarding the circumstances surrounding Rathjen's consent to the search. The court found that the officers did not restrain Rathjen at any time prior to his arrest. The court also found that Penner did not use intimidating words or gestures to obtain Rathjen's consent, but instead found that Penner was "cordial and polite" when he requested consent for the search. The court further concluded that Rathjen was not impaired when he granted Penner consent for the search. Based upon these findings, the court concluded that Rathjen's consent to the search was valid.

We have reviewed the record and conclude that the district court's factual findings were not clearly erroneous. Penner testified during the hearing on the motion to suppress that he asked Rathjen if he could "search the vehicle," to which Rathjen responded that "it was fine." Rathjen voluntarily consented to the search of his vehicle. We next consider the scope of Rathjen's consent.

[8,9] A consensual search by its very definition is circumscribed by the extent of the permission given, as determined by the totality of the circumstances. *State v. Wells*, 539 So. 2d 464 (Fla. 1989), *affirmed on other grounds* 495 U.S. 1, 110 S. Ct. 1632, 109 L. Ed. 2d 1 (1990). The standard for measuring the scope of a suspect's consent under the Fourth Amendment is that of objective reasonableness—what would the typical reasonable person have understood by the exchange between the officer and the suspect? *Florida v. Jimeno*, 500 U.S. 248, 111 S. Ct. 1801, 114 L. Ed. 2d 297 (1991). See, also, *U.S. v. Siwek*, 453 F.3d 1079 (8th Cir. 2006).

Because we view the locked toolbox in this case as analogous to the trunk of an automobile, we observe that several courts have concluded that a suspect's general consent to a vehicle search permitted officers to search the vehicle's trunk. See, e.g., *State v. Dunkel*, 143 P.3d 290 (Utah App. 2006) (general consent to search vehicle for drugs extended scope of search to trunk and most containers found therein that could contain narcotics); *State v. Castellon*, 151 N.C. App. 675, 566 S.E.2d 696 (2002) (suspect's general consent to search vehicle allowed officers to search trunk of car). These cases support the notion that Rathjen's response constituted a general consent which authorized Penner to search the locked toolbox.

[10] After determining that Rathjen's initial response extended authorization to the locked toolbox, we next consider whether Rathjen otherwise limited the scope of his consent to the passenger compartment. Whether there were any limitations placed on the consent given and whether the search conformed to those limitations are questions of fact to be determined by the totality of the circumstances. *State v. Tucker*, 262 Neb. 940, 636 N.W.2d 853 (2001).

The circumstances would allow the district court to conclude that Rathjen did not limit the scope of the consent. Penner testified that Rathjen did not say that Penner could not search the toolbox. In light of the conversation that took place immediately prior to Rathjen's granting consent for the search, the court could find that Rathjen knew that one of the items that Penner would search for was narcotics. The toolbox was a place where one could reasonably expect illegal substances, such as narcotics, to be hidden. The key to unlock the toolbox was on the keyring hanging from the key in the ignition.

The district court made findings consistent with the evidence. The court found that Penner did not seek separate consent to search the toolbox, but did not know that the toolbox was locked when he requested consent for the search. The court also found that Rathjen did not limit the scope of his consent. It further found that Rathjen did not attempt to revoke or limit his consent to the search after Penner commenced the search. We find that it was not clearly erroneous for the district court to implicitly conclude that a reasonable person would have understood the exchange between Penner and Rathjen to include consent to search the toolbox.

[11] We also find significant the fact that Rathjen did not object when the search extended to the toolbox. Whether one who consents later objects to an ongoing search is a significant inquiry determining whether there is a limitation placed on the scope of the consent that has been granted. *State v. Claus*, 8 Neb. App. 430, 594 N.W.2d 685 (1999). Although Rathjen was in Copeland's patrol car when Penner searched the toolbox, Rathjen did not testify that his view was impaired. Penner searched the passenger compartment while Rathjen watched. Rathjen knew that the search was continuing after he entered Copeland's patrol car. He also left the key to the toolbox in the passenger compartment and did not tell Penner that he did not have Rathjen's permission to utilize the key to unlock the toolbox.

CONCLUSION

The district court's findings that Rathjen consented to the search of his vehicle and that such consent extended to the

locked toolbox were not clearly erroneous. The district court therefore did not err in overruling Rathjen's motion to suppress evidence discovered during the search. We affirm the court's judgment.

AFFIRMED.

KEITH L. INMAN, APPELLANT, V. NEBRASKA METHODIST HOSPITAL ET AL., APPELLEES.

754 N.W.2d 767

Filed July 1, 2008. No. A-07-243.

1. **Limitations of Actions: Malpractice: Time.** Nebraska has a 2-year statute of limitations for actions for professional negligence except that causes of action not discovered, and which could not have been reasonably discovered until after the limitations period has run, can be filed within 1 year of discovery, with an overall limitation of 10 years after the date of rendering or failing to render such professional service which provides the basis for the cause of action.
2. **Limitations of Actions: Malpractice.** For claims alleging professional malpractice, the period of limitations begins to run when the treatment relating to the allegedly wrongful act or omission is completed.
3. **Limitations of Actions: Words and Phrases.** Discovery, as applied to statutes of limitations, refers to the fact that one knows of the existence of an injury or damage and not that he or she has a legal right to seek redress in court.
4. **Limitations of Actions.** A cause of action accrues, and the statute of limitations begins to run, when there has been discovery of facts constituting the basis of the cause of action.
5. **Limitations of Actions: Malpractice.** In a professional negligence case, "discovery of the act or omission" occurs when the party knows of facts sufficient to put a person of ordinary intelligence and prudence on inquiry which, if pursued, would lead to the knowledge of facts constituting the basis of the cause of action.
6. **Malpractice: Damages: Words and Phrases.** In a cause of action for professional negligence, legal injury is the wrongful act or omission which causes the loss; it is not damage, which is the loss resulting from the misconduct.

Appeal from the District Court for Douglas County: PATRICIA A. LAMBERTY, Judge. Affirmed in part, and in part reversed and remanded for further proceedings.

Mark A. Weber, Kylie A. Wolf, and Betty Egan, of Walentine, O'Toole, McQuillan & Gordon, for appellant.

David J. Cripe, of Sodoro, Daly & Sodoro, P.C., for appellees.

INBODY, Chief Judge, and IRWIN and CARLSON, Judges.

IRWIN, Judge.

I. INTRODUCTION

Keith L. Inman appeals orders of the district court for Douglas County, Nebraska, granting summary judgment and dismissing Inman's medical malpractice suit. Our review leads us to conclude that the district court correctly granted summary judgment to Randall Duckert, M.D., but incorrectly granted summary judgment on the question of whether the statute of limitations bars Inman's claim against Nebraska Methodist Hospital and Nebraska Methodist Health System, Inc. (collectively Methodist); Physicians Clinic, Inc. (Physicians); and Frederick W. Feuerstein, M.D., individually, based on the claim against Feuerstein. There is, at a minimum, a genuine issue of material fact concerning when Inman should reasonably have discovered Feuerstein's alleged malpractice. As such, we affirm in part, and in part reverse and remand for further proceedings.

II. BACKGROUND

This case concerns alleged medical malpractice by Feuerstein in his treatment of Inman in December 2001 and shortly thereafter. The gravamen of Inman's malpractice claim against Feuerstein is the allegation that Feuerstein failed to advise Inman of a masslike lesion that was allegedly visible in a chest x ray and that Feuerstein failed to properly follow up with Inman by ordering a subsequent chest x ray. The lesion was ultimately discovered and surgically removed, and Inman received additional treatment by Tracy Dorheim, M.D., and Randall Duckert, M.D. Inman brought a medical malpractice suit against Dorheim and Duckert, and later added Feuerstein to the case as a defendant. Inman asserts that he was not aware of the lesion until October 2003, when it was revealed in a CT scan performed by Dorheim and Duckert, and that he was not aware of the lesion's alleged visibility in the December 2001 chest x ray until early September 2006, when discovery in the course of Inman's suit against Dorheim and Duckert resulted in Inman's expert witness'

raising the issue in early September 2006. Later in September 2006, Inman filed an amended complaint naming Feuerstein in the lawsuit.

In December 2001, Inman was treated by Feuerstein. Feuerstein ordered a chest x ray. The radiology results from that x ray stated that there was a "mass-like lesion present" and that while the lesion "could be pneumonia, a follow-up chest x-ray is recommended." According to Inman, Feuerstein did not advise Inman that there was a masslike lesion after the x ray or during a followup visit in January 2002. Also according to Inman, Feuerstein did not advise Inman to receive a followup x ray.

In October 2003, Inman was treated by Dorheim and Duckert, and a CT scan revealed the masslike lesion, diagnosed as a thymoma. In December 2003, Dorheim performed surgery and removed the thymoma; during surgery, one of Inman's phrenic nerves was compromised. Following surgery, Dorheim and Duckert treated Inman with radiation therapy. Since that surgery and treatment, Inman has allegedly suffered a number of injuries, including medical expenses, loss of lung function and capacity, loss of enjoyment of life, and loss of earning capacity.

On December 16, 2005, Inman filed a complaint naming Dorheim, Duckert, and Methodist as defendants. Inman alleged medical malpractice as well as lack of informed consent and battery as his causes of action again Dorheim and Duckert and alleged liability on behalf of Methodist because it provided facilities, personnel, and privileges to Dorheim and Duckert.

In June 2006, Dorheim and Duckert each filed motions for summary judgment. In July, a hearing was held, during which Inman offered an affidavit of counsel attesting to difficulties securing discovery of Inman's complete medical records from the named defendants. At the conclusion of the hearing, the court ordered production of the requested medical records and continued the hearing.

On September 8, 2006, Dr. Cam Nguyen, who was retained by Inman to review his medical records, authored a report to Inman's counsel. In that report, Nguyen noted "the mediastinal mass first reported on Dec. 27, 2001 CXR" and indicated that "[o]f note" were "the abnormal Chest X-Rays first reported on December 27, 2001 and apparently relayed to Dr. Feuerstein

on the same day." Nguyen then stated, "However, I have not seen any evidence through the medical records provided to me that this was followed clinically to ensure that the abnormal mediastinal mass was followed" and indicated that "[i]f further interview with the patient himself and after review of medical records from the period of December 2001-October 2003 reveals no follow-up of this abnormal CXR, [that] constitutes physician's neglect."

On September 25, 2006, Inman filed a motion seeking to amend his complaint to include a claim of medical malpractice against Feuerstein. The amended complaint was filed on September 27, and it alleged that Feuerstein had been negligent in his diagnosis and treatment of Inman and in not advising Inman of a known mass in Inman's chest. The amended complaint also named Physicians for the same reasons that Methodist had previously been named.

In October 2006, the district court granted the summary judgment motions filed by Dorheim and Duckert. The court held that each doctor had presented an affidavit opining that his care of Inman had not fallen below the standard of care required and that Inman had not presented any expert opinion to the contrary. Although Inman's appeal to this court included challenges to the trial court's granting of summary judgment to Dorheim and Duckert, Dorheim moved this court for summary affirmance and we sustained the motion. As such, this appeal no longer concerns Dorheim.

On January 5, 2007, Feuerstein, Methodist, and Physicians filed a motion for summary judgment. The district court conducted a hearing on the motion on February 1. On February 6, the court entered an order granting the motion for summary judgment. The court held that although the applicable statute of limitations was 2 years from the time of the alleged negligence, the statute could be tolled by the discovery rule, which allows the claimant to file a claim within 1 year of discovery of the injury. The court held that the statute of limitations had run on Inman's claim against Feuerstein, because Inman was aware of the physical symptoms of fatigue, shortness of breath, and decreased lung capacity by July 2004 and did not name Feuerstein as a defendant until September 2006. This appeal followed.

III. ASSIGNMENTS OF ERROR

Inman's three assignments of error are as follows: (1) The district court erred in granting summary judgment to Duckert, (2) the district court erred in granting summary judgment to Feuerstein, and (3) the district court erred in dismissing his complaint because his claims against Methodist and Physicians should have survived.

IV. ANALYSIS

Inman appeals the district court's grant of summary judgment in this medical malpractice action. Summary judgment is to be granted when there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *Boyd v. Chakraborty*, 250 Neb. 575, 550 N.W.2d 44 (1996). Summary judgment is proper only when the pleadings, depositions, admissions, stipulations, and affidavits in the record disclose that there is no genuine issue as to any material fact or as to the ultimate inferences that may be drawn from those facts and that the moving party is entitled to judgment as a matter of law. *Id.*

On a motion for summary judgment, the question is not how a factual issue is to be decided, but whether any real issue of material fact exists. *Id.* In reviewing a summary judgment, an appellate court views the evidence in a light most favorable to the party against whom the judgment is granted and gives such party the benefit of all reasonable inferences deducible from the evidence. *Id.*

The party moving for summary judgment has the burden to show that no genuine issue of material fact exists and must produce sufficient evidence to demonstrate that the moving party is entitled to judgment as a matter of law. *Id.* After the moving party has shown facts entitling it to a judgment as a matter of law, the opposing party has the burden to present evidence showing an issue of material fact which prevents judgment as a matter of law for the moving party. *Id.*

1. Inman's Claim Against Duckert

Inman asserts that the district court erred in granting summary judgment to Duckert. Inman asserts that he adduced sufficient evidence to create a genuine issue of material fact

regarding Duckert's alleged negligence. Because the only expert evidence offered by Inman was Nguyen's affidavit and report, and because that affidavit and report did not opine that Duckert breached the standard of care, we find no merit to this assignment of error.

The Nebraska Supreme Court has held that an affidavit of a defendant physician in a malpractice case, which affidavit states that the defendant did not breach the appropriate standard of care, presents a prima facie case of lack of negligence for the purposes of summary judgment. *Boyd v. Chakraborty, supra*. Regarding the plaintiff's burden of proving that a defendant physician fell below the requisite standard of care, the Nebraska Supreme Court has held that whether a specific manner of treatment or exercise of skill by a physician demonstrates a lack of skill or knowledge or failure to exercise reasonable care is a matter that, usually, must be proved by expert testimony. See *id.*

In this case, Duckert supported his motion for summary judgment by offering his own affidavit, in which affidavit Duckert stated that he did not breach the appropriate standard of care. As such, Duckert presented a prima facie case of lack of negligence for the purposes of summary judgment. The burden was then on Inman to present sufficient evidence to create a genuine issue of material fact or to demonstrate that Duckert was not entitled to a judgment as a matter of law.

To satisfy his burden of proof, Inman presented the affidavit and report of Nguyen. A review of that report indicates that the majority of specific evaluations and treatments discussed were noted to have been "appropriate." Nguyen did not provide any opinion indicating that any of Duckert's actions fell below the standard of care. Because this was the only expert evidence offered by Inman and because that evidence did not present any expert opinion that Duckert was negligent, Inman failed to carry his burden and Duckert was entitled to summary judgment. This assignment of error is without merit.

2. Inman's Claim Against Feuerstein

Inman asserts that the district court erred in granting summary judgment to Feuerstein. Inman asserts that the statute

of limitations should not have barred his claim against Feuerstein because he did not discover Feuerstein's negligence until September 2006 and he amended his complaint to name Feuerstein as a defendant later the same month. We conclude that there is at a minimum a genuine issue of material fact concerning when Inman discovered Feuerstein's negligence and, accordingly, summary judgment was improper.

[1,2] Nebraska has a 2-year statute of limitations for actions for professional negligence except that causes of action not discovered, and which could not have been reasonably discovered until after the limitations period has run, can be filed within 1 year of discovery, with an overall limitation of 10 years after the date of rendering or failing to render such professional service which provides the basis for the cause of action. *Anonymous v. Vasconcellos*, 15 Neb. App. 363, 727 N.W.2d 708 (2007). See, also, Neb. Rev. Stat. §§ 25-222 (Reissue 1995) and 44-2804 and 44-2806 (Reissue 2004). For claims alleging professional malpractice, the period of limitations begins to run when the treatment relating to the allegedly wrongful act or omission is completed. *Anonymous v. Vasconcellos, supra*.

In the present case, the alleged treatment or alleged wrongful act or omission was completed in December 2001 or January 2002, when Feuerstein allegedly failed to advise Inman of the presence of the mass in his chest x ray and allegedly failed to follow up with an additional chest x ray. As such, the standard statute of limitations would arguably have run by early 2004, unless the running of the statute is tolled by operation of the discovery rule.

[3,4] Discovery, as applied to statutes of limitations, refers to the fact that one knows of the existence of an injury or damage and not that he or she has a legal right to seek redress in court. *Id.* A cause of action accrues, and the statute of limitations begins to run, when there has been discovery of facts constituting the basis of the cause of action. *Id.* A cause of action consists of the set of facts on which a recovery may be had. *Id.* The discovery of the basis of the cause of action is the preeminent concept in determining whether the discovery exception applies to toll the statute of limitations. *Id.*

[5,6] In a professional negligence case, "discovery of the act or omission" occurs when the party knows of facts sufficient to put a person of ordinary intelligence and prudence on inquiry which, if pursued, would lead to the knowledge of facts constituting the basis of the cause of action. *Gering-Ft. Laramie Irr. Dist. v. Baker*, 259 Neb. 840, 612 N.W.2d 897 (2000). In a cause of action for professional negligence, legal injury is the wrongful act or omission which causes the loss; it is not damage, which is the loss resulting from the misconduct. *Id.*

In the present case, Inman created, at a minimum, a genuine issue of material fact concerning when he discovered the cause of action against Feuerstein. The district court focused on Inman's knowledge of the permanent effects of the mass, its removal, and the related treatment—fatigue, shortness of breath, and a decrease in pulmonary function. The district court held that "[a]t that time, [Inman] became aware of facts sufficient to put a person of ordinary intelligence and prudence on inquiry which if pursued would lead to the discovery of the existence of the cause of action." However, the court failed to indicate how Inman's knowledge of the permanent symptoms of the mass, its removal, and the related treatment put Inman on notice that Feuerstein had, nearly 3 years prior, failed to advise him of a known mass and failed to properly follow up regarding the mass.

The record indicates that after Inman filed suit against Dorheim and Duckert, he attempted to obtain complete copies of his medical records through the course of discovery. As late as June 2006, he had been unsuccessful in doing so. The record suggests it was not until September that Inman had any knowledge that the mass had ever shown up on a prior x ray or had any reason to suspect that Feuerstein had failed to advise him and follow up properly. On the record before us, it is knowledge of this injury—Feuerstein's alleged failure to properly advise and follow up—that constitutes discovery. Because Inman filed his amended complaint naming Feuerstein as a defendant less than 1 month after discovery, the district court erred in finding that the statute of limitations had run on the basis of the record presented.

3. Inman's Claim Against Methodist and Physicians

Inman's claims against Methodist and Physicians were also dismissed because summary judgment was granted to Dorheim, Duckert, and Feuerstein. Inasmuch as we have reversed the summary judgment granted to Feuerstein, we also reverse the summary judgment granted to Methodist and Physicians.

V. CONCLUSION

We affirm the district court's grant of summary judgment to Duckert. We reverse the district court's grant of summary judgment to Feuerstein, Methodist, and Physicians.

Affirmed in part, and in part reversed and remanded for further proceedings.

Shauna Wilken, mother and next friend of Cheyenne Wilken and Wyatt Wilken, minor children, and Jeffery Wilken, appellants and cross-appellees, v. City of Lexington, a political subdivision of the State of Nebraska, appellee and cross-appellant.

754 N.W.2d 616

Filed July 1, 2008. No. A-07-553.

1. **Summary Judgment.** Summary judgment is proper when the pleadings and evidence admitted at the hearing disclose no genuine issue as to any material fact or as to the ultimate inferences that may be drawn from those facts and that the moving party is entitled to judgment as a matter of law.
2. **Summary Judgment: Appeal and Error.** In reviewing a summary judgment, an appellate court views the evidence in a light most favorable to the party against whom the judgment is granted and gives such party the benefit of all reasonable inferences deducible from the evidence.
3. **Political Subdivisions Tort Claims Act: Negligence.** A negligence action brought under the Political Subdivisions Tort Claims Act has the same elements as a negligence action against a private individual, i.e., duty, breach of duty, causation, and damages.
4. **Negligence: Proximate Cause: Proof.** To establish proximate cause, there are three basic requirements. First, the negligence must be such that without it, the injury would not have occurred, commonly known as the "but for" rule. Second, the injury must be the natural and probable result of the negligence. Third, there can be no efficient intervening cause.

5. **Negligence: Proximate Cause: Words and Phrases.** An efficient intervening cause is new and independent conduct of a third person, which itself is a proximate cause of the injury in question and breaks the causal connection between the original conduct and the injury.
6. **Negligence: Tort-feasors: Liability.** An intervening act cuts off a tort-feasor's liability only when the intervening cause is not foreseeable.
7. **Negligence: Proximate Cause.** It may be stated as a general rule that when, between original negligence and an accident, there intervenes a willful, malicious, and criminal act of a third person which causes the injury but was not intended by the person originally negligent and could not have been foreseen by him, the causal chain between the original negligence and the accident is broken.
8. ____: ____. The causal connection is broken if, between the defendant's negligent act and the plaintiff's injury, there has intervened the negligence of a third person who had full control of the situation and whose negligence was such as the defendant was not bound to anticipate and could not be said to have contemplated, which later negligence resulted directly in the injury to the plaintiff.
9. ____: ____. The act of a third person in committing an intentional tort or crime is a superseding cause of harm to another resulting therefrom, although the actor's negligent conduct created a situation which afforded an opportunity to the third person to commit such a tort or crime, unless the actor at the time of his negligent conduct realized or should have realized the likelihood that such a situation might be created, and that a third person might avail himself of the opportunity to commit such a tort or crime.
10. **Negligence: Liability.** Once it is shown that a defendant had a duty to anticipate an intervening criminal act and guard against it, the criminal act cannot supersede the defendant's liability.
11. **Police Officers and Sheriffs: Probation and Parole: Liability.** Law enforcement officials, including supervising probation officers and, consequently, state and local governments, generally may not be held liable for failure to protect individual citizens from harm caused by criminal conduct.
12. **Police Officers and Sheriffs: Liability.** There are situations that provide exceptions to the no-duty rule: (1) where individuals who have aided law enforcement as informers or witnesses are to be protected or (2) where the police have expressly promised to protect specific individuals from precise harm.
13. **Negligence.** There is no duty to control the conduct of a third person so as to prevent him from causing physical harm to another unless (1) a special relation exists between the actor and the third person which imposes a duty upon the actor to control the third person's conduct or (2) a special relation exists between the actor and the other which gives to the other a right to protection.
14. ____. One who takes charge of a third person whom he knows or should know to be likely to cause bodily harm to others if not controlled is under a duty to exercise reasonable care to control the third person to prevent him from doing such harm.
15. **Appeal and Error.** An appellate court is not obligated to engage in an analysis which is not needed to adjudicate the controversy before it.

Appeal from the District Court for Dawson County: JAMES E. DOYLE IV, Judge. Affirmed.

Maren Lynn Chaloupka and Robert Paul Chaloupka, of Chaloupka, Holyoke, Hofmeister, Snyder & Chaloupka, for appellants.

Thomas J. Culhane and Jason R. Yungtum, of Erickson & Sederstrom, P.C., for appellee.

SIEVERS, MOORE, and CASSEL, Judges.

MOORE, Judge.

INTRODUCTION

Shauna Wilken, mother and next friend of the minor children, Cheyenne Wilken and Wyatt Wilken, and Jeffery Wilken (Wilken) brought a negligence action against the City of Lexington, Nebraska (City), in the district court for Dawson County. The district court granted summary judgment in favor of the City. Shauna and Wilken (hereinafter the Appellants) appeal, and the City cross-appeals. Because the court did not err in finding an efficient intervening cause cutting off any liability on the part of the City for the injuries to Wilken, Cheyenne, and Wyatt, we affirm the order granting the City's motion for summary judgment.

BACKGROUND

On October 4, 2004, the Buffalo County sheriff's office received a report of a missing juvenile, W.V., who resided in Elm Creek, Nebraska, and was reported missing by her mother. The Lexington Police Department received the missing person report the day it was issued.

On October 5, 2004, Kenneth Schumacher, an investigator with the Lexington Police Department, received a report from an acquaintance that the acquaintance's son had brought home an unknown young girl. Schumacher went to the acquaintance's home in Lexington, where he met a female juvenile who identified herself as W.V. Schumacher asked W.V. to come with him to the police department. W.V. left the house, walked to Schumacher's vehicle, and rode with Schumacher to the police station without any restraints such as handcuffs. Nor did Schumacher control W.V. by holding on to her.

When Schumacher and W.V. arrived at the police station, W.V. got out of the vehicle, walked into the station, and accompanied

Schumacher to his office without any restraints or resistance. Schumacher interviewed W.V. in his office without incident. Schumacher telephoned the Buffalo County sheriff's office, learned additional information about W.V., determined that she was the missing juvenile, and arranged for delivery of W.V. to the Buffalo County sheriff's office, all while W.V. was unrestrained in his office.

Schumacher and Buffalo County Deputy Sheriff Katherine Tvrdik arranged to meet near the county line in Overton, Nebraska, to allow Tvrdik to pick up W.V. and return her to Buffalo County authorities. Shortly after making these arrangements, Schumacher and W.V. left the Lexington Police Department, walked to Schumacher's vehicle, and began the drive to Overton. W.V.'s entry into Schumacher's vehicle and the trip to Overton were completed without incident. At no time during the trip was W.V. restrained, and she made no effort to flee or resist Schumacher in his efforts to return her to Buffalo County.

During the time Schumacher and W.V. were together on October 5, 2004, W.V. advised Schumacher that she had run away from home and that she had taken a vehicle from Elm Creek the previous day that was not hers, but that she believed she was authorized to drive it. W.V. also told Schumacher that she had used methamphetamine in the preceding year and had used it during the 24 hours preceding her apprehension by Schumacher. According to Schumacher, W.V. did not appear to be under the influence of any substance, including methamphetamine, despite her disclosure. Schumacher also learned that W.V. had been involved in an argument and possibly a fistfight with another girl at her school on the previous day.

Upon reaching Overton, Schumacher parked his car at a gas station to wait for Tvrdik. W.V. was seated in the front passenger seat of Schumacher's vehicle and was unrestrained except for the seatbelt that she had worn during the trip. When Tvrdik arrived, Schumacher told W.V. to leave the car, and he watched while she unbuckled her seatbelt and began to open the passenger-side door. Schumacher then got out of the vehicle, leaving the key in the ignition and the engine running, and he walked to the vehicle driven by Tvrdik.

As Schumacher was handing a written report to Tvrdik, W.V. climbed behind the steering wheel of Schumacher's vehicle and drove off at a high rate of speed. Schumacher got into Tvrdik's vehicle, and Tvrdik began a pursuit of W.V. The pursuit was terminated before W.V. was apprehended, due to public safety concerns. At all relevant times, Schumacher was on duty as an investigator for the City and the car driven initially by Schumacher and then taken by W.V. was owned and maintained as a police vehicle by the City.

After taking Schumacher's vehicle, W.V. returned to Lexington and picked up E.G., also a juvenile. W.V. and E.G. drove to Cozad, Nebraska, stealing another vehicle and subsequently abandoning Schumacher's vehicle. Schumacher's vehicle was recovered on October 6, 2004, outside of Lexington, where it had been abandoned by W.V. and E.G. W.V. and E.G. took various items from Schumacher's vehicle, including a loaded police-issued shotgun which was in the trunk of the vehicle.

W.V. and E.G.'s next encounter with law enforcement officials occurred on October 6, 2004, when a Nebraska State Patrol officer spotted them in the vehicle stolen from Cozad and attempted to stop them. E.G. was driving, and when E.G. stopped the vehicle, W.V. got out and used the shotgun taken from Schumacher's vehicle to shoot at the patrol officer. After escaping from the patrol officer, W.V. and E.G. abandoned the vehicle stolen from Cozad and stole a third vehicle.

On October 7, 2004, W.V. and E.G. were seen in Holdrege, Nebraska, and officers from various law enforcement agencies began a pursuit of W.V. and E.G. in Phelps County, Nebraska. The law enforcement officers pursued W.V. and E.G. on Phelps County Road 748, at which time the stolen vehicle encountered a pickup truck being driven in the opposite direction by Wilken. In the rear seat of Wilken's pickup were his two children, Cheyenne and Wyatt. As the stolen vehicle approached Wilken's pickup, E.G., using the shotgun and ammunition stolen from the trunk of Schumacher's vehicle, fired a shot at the pickup. The shot hit the rear side window of the pickup, shattering the glass. Cheyenne and Wyatt sustained physical injuries. Later on October 7, the pursuit of W.V. and E.G. concluded at a different location, at which time W.V. and E.G. were apprehended.

On October 21, 2005, the Appellants filed a complaint against the City under Nebraska's Political Subdivisions Tort Claims Act. The Appellants alleged that Cheyenne and Wyatt sustained physical and mental injuries and that Wilken sustained mental injuries, all of which were proximately caused by the City's negligence. Specifically, the Appellants alleged that the City was negligent in that (1) Schumacher left an unrestrained prisoner and a loaded shotgun in his running vehicle, while he exited the vehicle to visit with another person, and failed to take reasonable measures to prevent W.V. from absconding with his vehicle and weapon and (2) the City negligently supervised Schumacher during the course of his employment. The Appellants sought compensatory damages for past and future medical expenditures, psychiatric treatment, and pain and suffering in an amount to be proved at trial.

On March 15, 2007, the City filed a motion for summary judgment. On March 21, the Appellants filed a motion for partial summary judgment seeking summary judgment on the issue of the City's negligence.

After a hearing on the parties' summary judgment motions, the district court entered an order on May 11, 2007, overruling the Appellants' motion for partial summary judgment and granting summary judgment in favor of the City. The court observed that the reported cases in Nebraska addressing the issue of foreseeability and proximate cause in the context of the actions of a third party typically involve the actions of a third party with whom the allegedly negligent party had some contact or a relationship. The court noted that in this case, the third party whose act caused the injury, E.G., is in reality a "'fourth party'" who had no direct contact with the City, the alleged negligent party. The court observed that E.G. used resources from the "third party," W.V., to injure Wilken, Cheyenne, and Wyatt and that those resources were obtained by W.V. by virtue of the alleged negligence of the City.

In considering the question of the City's duty, the district court found no genuine issue of material fact that the Lexington Police Department had taken control of W.V. and that W.V. was a person who Schumacher knew or should have known was likely to cause bodily harm to others if she was not controlled.

The court concluded that the evidence established that a "'special relationship'" existed between the City and W.V., which imposed a duty upon the City to control W.V.'s conduct. The court further concluded that there was no genuine issue of material fact that Schumacher did not control W.V.'s conduct and that because of his failure, W.V. stole his vehicle and its contents. The court found that W.V.'s actions in stealing Schumacher's vehicle were reasonably foreseeable.

The district court next considered proximate causation and found no genuine issue of material fact that the injuries suffered by Wilken, Cheyenne, and Wyatt were caused by E.G.'s discharge of the shotgun. The court concluded that E.G.'s actions were a new, independent force, which intervened between the City's negligent act and the injuries to Wilken, Cheyenne, and Wyatt. The court observed that E.G. had full control of the situation and that it was his conduct which resulted directly in the injuries. The court found that the City could not have reasonably anticipated or contemplated E.G.'s conduct, reasoning that E.G., his propensities, his dangerousness, and any relationship between him and W.V. were unknown to the City.

The court explained its reasoning regarding the finding of an efficient intervening cause further as follows:

> The court can find no Nebraska cases which required an actor to foresee and avoid the intentional criminal acts of a fourth party whose criminal acts were committed with the assistance of a third party with whom the actor had a "special relationship." The firing of the shotgun by [E.G.] during the chase of [E.G.] and [W.V.] in Phelps County, Nebraska, two days after the initial contact between [Schumacher] and [W.V.], broke the causal connection between the original conduct of [Schumacher] and the injuries suffered by [Wilken, Cheyenne, and Wyatt].
>
> While it can be argued that the City . . . had a duty to anticipate that the theft of one of its police vehicles containing a shotgun and ammunition could create the potential for dangerous circumstances and situations, such a result is not a natural "*and probable*" result. Crimes with shotguns can and do occur in a variety of settings and the fact that an additional shotgun became available to a

> person disposed as was [E.G.], does not support the imposition of liability for the unlawful use of the stolen shotgun. The facts alleged by the [Appellants] and those established by [the evidence at the summary judgment hearing] do not present the type of knowledge on the part of the City . . . which would render the criminal conduct of an unknown person such as [E.G.] reasonably foreseeable.
>
> The criminal acts of [E.G.] were an efficient intervening cause which destroys any claim that the alleged negligence of the City . . . was the proximate cause of the . . . injuries and damages.

(Emphasis in original.)

ASSIGNMENTS OF ERROR

The Appellants assert that the district court erred in granting the City's motion for summary judgment.

On cross-appeal, the City asserts that the district court erred in finding (1) that a special relationship existed between the City and W.V. such that the City had a duty to control W.V.'s conduct, (2) that Schumacher failed to control W.V. and consequently breached his duty, and (3) that it was foreseeable that W.V. would steal Schumacher's vehicle.

STANDARD OF REVIEW

[1] Summary judgment is proper when the pleadings and evidence admitted at the hearing disclose no genuine issue as to any material fact or as to the ultimate inferences that may be drawn from those facts and that the moving party is entitled to judgment as a matter of law. *Heinze v. Heinze*, 274 Neb. 595, 742 N.W.2d 465 (2007).

[2] In reviewing a summary judgment, an appellate court views the evidence in a light most favorable to the party against whom the judgment is granted and gives such party the benefit of all reasonable inferences deducible from the evidence. *Eastlick v. Lueder Constr. Co.*, 274 Neb. 467, 741 N.W.2d 628 (2007).

ANALYSIS

Efficient Intervening Cause.

[3] The Appellants assert that the district court erred in granting the City's motion for summary judgment. Specifically, they

argue that the court erred in determining that E.G.'s actions amounted to an efficient intervening cause, cutting off the City's liability for any negligence. A negligence action brought under the Political Subdivisions Tort Claims Act has the same elements as a negligence action against a private individual, i.e., duty, breach of duty, causation, and damages. *Doe v. Omaha Pub. Sch. Dist.*, 273 Neb. 79, 727 N.W.2d 447 (2007). The question of causation, specifically, whether there was an efficient intervening cause cutting off the City's liability for any negligence, is at issue in the present appeal.

[4-6] The district court found that the Lexington Police Department had taken control over W.V., creating a special relationship and imposing a duty to control her conduct. However, the court found that the intervening intentional criminal conduct of E.G. was not foreseeable and was thus an efficient intervening cause, breaking any causal connection between the City's breach of its duty to control W.V. and the injuries to Wilken, Cheyenne, and Wyatt. To establish proximate cause, there are three basic requirements. First, the negligence must be such that without it, the injury would not have occurred, commonly known as the "but for" rule. Second, the injury must be the natural and probable result of the negligence. Third, there can be no efficient intervening cause. *Malolepszy v. State*, 273 Neb. 313, 729 N.W.2d 669 (2007). An efficient intervening cause is new and independent conduct of a third person, which itself is a proximate cause of the injury in question and breaks the causal connection between the original conduct and the injury. *Id.* An intervening act cuts off a tort-feasor's liability only when the intervening cause is not foreseeable. *Willet v. County of Lancaster*, 271 Neb. 570, 713 N.W.2d 483 (2006).

[7-9] It may be stated as a general rule that when, between original negligence and an accident, there intervenes a willful, malicious, and criminal act of a third person which causes the injury but was not intended by the person originally negligent and could not have been foreseen by him, the causal chain between the original negligence and the accident is broken. *Shelton v. Board of Regents*, 211 Neb. 820, 320 N.W.2d 748 (1982). The Nebraska Supreme Court has stated that the causal connection is broken if, between the defendant's negligent act

and the plaintiff's injury, there has intervened the negligence of a third person who had full control of the situation and whose negligence was such as the defendant was not bound to anticipate and could not be said to have contemplated, which later negligence resulted directly in the injury to the plaintiff. *Id.* The act of a third person in committing an intentional tort or crime is a superseding cause of harm to another resulting therefrom, although the actor's negligent conduct created a situation which afforded an opportunity to the third person to commit such a tort or crime, unless the actor at the time of his negligent conduct realized or should have realized the likelihood that such a situation might be created, and that a third person might avail himself of the opportunity to commit such a tort or crime. *Id.*

In *Shelton*, an employee with a criminal background stole poison from his employer. The employee then broke into the homes of several people and placed the poison in beverages found in their homes. Several individuals were poisoned as a result, and some died. The injured parties sued the employer, alleging it was negligent in failing to discover the employee's criminal background and allowing him access to the poison. The Nebraska Supreme Court determined that the employee's criminal actions of stealing the poison, breaking into the homes, and poisoning the victims were the proximate cause of the appellants' injuries. The court observed that none of the employer's alleged failures was related in any way to those acts and that those acts could not have been reasonably contemplated by the employer. The court determined that because the employee's past criminal history did not involve theft or poisoning, even if the employer had learned of the criminal history, the employee's action still would not have been foreseeable.

[10] In *Shelton*, the Supreme Court found an efficient intervening cause where the alleged negligence was indirect and distant from the perpetration of the criminal act. In contrast, in *Anderson/Couvillon v. Nebraska Dept. of Soc. Servs.*, 248 Neb. 651, 538 N.W.2d 732 (1995), the court found no efficient intervening cause where the defendant's alleged negligence has a direct connection with and effect on the criminal acts that followed. In *Anderson/Couvillon*, sexual assaults committed by a foster child were found not to be an efficient intervening cause

between negligence on the part of the State and the injuries of the girls assaulted by the foster child. Because the State had knowledge of the foster child's violent propensities and potential for becoming a sexual abuser, the Supreme Court determined that the State could have anticipated or contemplated the foster child's attacks on the girls who were frequently in the home of the foster parents. Accordingly, the State had a duty to disclose, upon direct questioning by the girls' mother, those portions of the foster child's history that would create a danger to the girls. The court observed that once it is shown that a defendant had a duty to anticipate an intervening criminal act and guard against it, the criminal act cannot supersede the defendant's liability. *Id.*

In the present case, E.G.'s criminal act was the proximate cause of any injuries to Wilken, Cheyenne, and Wyatt. The record does not show that the City had any knowledge about E.G., his propensity for violence or crime, or any connection he may have had with W.V. prior to the events in question. Thus, E.G.'s actions were not such that the City should have anticipated them. E.G.'s actions were therefore a superseding cause.

[11-14] Law enforcement officials, including supervising probation officers and, consequently, state and local governments, generally may not be held liable for failure to protect individual citizens from harm caused by criminal conduct. *Bartunek v. State*, 266 Neb. 454, 666 N.W.2d 435 (2003). There are situations that provide exceptions to the no-duty rule: (1) where individuals who have aided law enforcement as informers or witnesses are to be protected or (2) where the police have expressly promised to protect specific individuals from precise harm. *Brandon v. County of Richardson*, 252 Neb. 839, 566 N.W.2d 776 (1997). There is no duty to control the conduct of a third person so as to prevent him from causing physical harm to another unless (1) a special relation exists between the actor and the third person which imposes a duty upon the actor to control the third person's conduct or (2) a special relation exists between the actor and the other which gives to the other a right to protection. *Bartunek, supra.* One who takes charge of a third person whom he knows or should know to be likely to cause bodily harm to others if not controlled is under a duty to

exercise reasonable care to control the third person to prevent him from doing such harm. *Id.*

The record does not show that the Appellants were informants or witnesses such that they needed to be protected; nor does the record reveal any express promise on the part of the City to protect the Appellants from precise harm. Further, there is nothing in the record to show a special relationship, or even any relationship, between the City and E.G. such that the City had a duty to control his conduct and prevent him from causing physical harm to another person. Finally, there is no evidence in the record of any special relationship between the City and the Appellants which would establish a duty by the City to specifically protect the Appellants from criminal action.

Viewing the evidence in the light most favorable to the Appellants and giving them the benefit of all reasonable inferences deducible from the evidence, as we must, we find no error in the district court's determination that the actions of E.G. were not foreseeable and were an efficient intervening cause, breaking the causal connection between the City's conduct and the injuries to Wilken, Cheyenne, and Wyatt. See *Eastlick v. Lueder Constr. Co.*, 274 Neb. 467, 741 N.W.2d 628 (2007). Accordingly, we affirm the court's grant of summary judgment in the City's favor.

City's Cross-Appeal.

[15] Given our resolution of the above assignment of error, we need not address the City's assignments of error on cross-appeal. An appellate court is not obligated to engage in an analysis which is not needed to adjudicate the controversy before it. *Papillion Rural Fire Prot. Dist. v. City of Bellevue*, 274 Neb. 214, 739 N.W.2d 162 (2007).

CONCLUSION

The district court did not err in granting the City's motion for summary judgment.

AFFIRMED.

JAMES RICK ZITTERKOPF, APPELLEE, V. AULICK INDUSTRIES AND THE UNITED FIRE GROUP, ITS WORKERS' COMPENSATION CARRIER, APPELLANTS.

753 N.W.2d 370

Filed July 1, 2008. No. A-07-1174.

1. **Workers' Compensation: Appeal and Error.** On appellate review, the findings of fact made by the trial judge of the Workers' Compensation Court have the effect of a jury verdict and will not be disturbed unless clearly wrong.
2. **Workers' Compensation: Liability.** Neb. Rev. Stat. § 48-120(1)(a) (Cum. Supp. 2006) provides that the employer is liable for all reasonable medical, surgical, and hospital services, including medicines as and when needed, which are required by the nature of the injury and which will relieve pain or promote and hasten the employee's restoration to health and employment.
3. **Workers' Compensation.** In order to accomplish the beneficent purpose of the Nebraska Workers' Compensation Act, it should be broadly construed.
4. ____. In workers' compensation cases, there must be a causal relationship between the original compensable injury and the medical care.
5. **Workers' Compensation: Evidence: Appeal and Error.** In testing the sufficiency of the evidence to support the findings of fact made by the Workers' Compensation Court, the evidence must be considered in the light most favorable to the successful party, and the factual findings by the compensation court have the same force and effect as a jury verdict in a civil case.
6. **Expert Witnesses.** The sufficiency of an expert's opinion is judged in the context of the expert's entire statement.
7. **Workers' Compensation: Appeal and Error.** When the record in a workers' compensation case presents conflicting medical testimony, an appellate court will not substitute its judgment for that of the compensation court.
8. **Workers' Compensation: Proof.** In order to recover under the Nebraska Workers' Compensation Act, a claimant has the burden of proving by a preponderance of the evidence that an accident or occupational disease arising out of and occurring in the course of employment proximately caused an injury which resulted in disability compensable under the act.
9. **Proximate Cause: Words and Phrases.** A proximate cause is a cause that produces a result in a natural and continuous sequence and without which the result would not have occurred.

Appeal from the Workers' Compensation Court. Affirmed.

John F. Simmons, of Simmons Olsen Law Firm, P.C., for appellants.

Jerald L. Ostdiek, of Douglas, Kelly, Ostdiek & Bartels, P.C., for appellee.

SIEVERS, MOORE, and CASSEL, Judges.

CASSEL, Judge.

INTRODUCTION

The original workers' compensation award, which found existing both a compensable injury and unrelated sleep apnea, granted future medical care. In this appeal, we consider whether medication deemed necessary both to treat the sleep apnea and to reduce the side effects of injury-related pain medication qualifies for the benefit. Because we find the evidence sufficient to support the trial judge's award requiring the employer to pay for the medication, we affirm.

BACKGROUND

Aulick Industries (Aulick) employed James Rick Zitterkopf as a welder. The United Fire Group (United) provides Aulick's workers' compensation insurance. On April 29, 1999, Zitterkopf was injured in a work-related explosion.

On February 3, 2006, the Nebraska Workers' Compensation Court entered an award determining that Zitterkopf was totally and permanently disabled as the result of the 1999 accident, which arose out of and in the course of his employment by Aulick. The award required Aulick to pay for Zitterkopf's future medical care as required by Neb. Rev. Stat. § 48-120 (Cum. Supp. 2006). The award also determined that Zitterkopf was subject to severe obstructive sleep apnea and hypersomnia, which are congenital and not related to his employment. The award denied medical expenses for treatment of the obstructive sleep apnea. No appeal was taken from the original award.

On May 26, 2006, Zitterkopf filed a motion to compel Aulick to pay for Provigil, which he alleged was necessary "because of the side effects from the pain medications which [he was] prescribed because of the work[-]related injury." On November 20, the Workers' Compensation Court trial judge conducted an evidentiary hearing. To the extent necessary, we will discuss the specific evidence in the analysis section below.

On March 20, 2007, the trial judge entered an order requiring Aulick to pay for the medication. The judge found that Provigil was prescribed for two reasons: (1) to treat the unrelated

condition of sleep apnea and (2) to treat the drowsiness due to pain medication required because of the work-related injuries. The judge concluded that Zitterkopf was only required to prove that "one of the reasons for the prescription . . . is for treatment of side effects of pain medication." Analogizing to an employee's entitlement to benefits where a work-related injury combines with a preexisting condition to produce disability, the judge stated that "[t]he same would hold true where the necessity of prescribed medication is caused by pain medication used to treat the injury arising out of and in the course of the employee's employment also but [sic] is used to treat a preexisting condition or condition unrelated to the compensable accident."

Aulick and United petitioned for panel review. The Workers' Compensation Court review panel summarily affirmed, finding that "the judgment is based on findings of fact which are not clearly wrong and no error of law appears."

Aulick and United timely appeal to this court.

ASSIGNMENT OF ERROR

Aulick and United assign that the trial court erred in ordering them to pay for Provigil.

STANDARD OF REVIEW

[1] On appellate review, the findings of fact made by the trial judge of the Workers' Compensation Court have the effect of a jury verdict and will not be disturbed unless clearly wrong. *Murphy v. City of Grand Island*, 274 Neb. 670, 742 N.W.2d 506 (2007).

ANALYSIS

[2] Section 48-120(1)(a) authorizes an award of future medical expenses, including necessary medication. Section 48-120(1)(a) provides: "The employer is liable for all reasonable medical, surgical, and hospital services, including . . . medicines as and when needed, which are required by the nature of the injury and which will relieve pain or promote and hasten the employee's restoration to health and employment . . . ."

This statutory section also empowers the Workers' Compensation Court to determine whether such expenses are

necessary. "The compensation court shall have the authority to determine the necessity, character, and sufficiency of any medical services furnished . . . ." § 48-120(6).

[3] The Legislature enacted the Nebraska Workers' Compensation Act in order to relieve injured workers from the adverse economic effects caused by a work-related injury or occupational disease. *Foote v. O'Neill Packing*, 262 Neb. 467, 632 N.W.2d 313 (2001). In order to accomplish the beneficent purpose of the act, it should be broadly construed. See *id*. In *Foote*, the Nebraska Supreme Court rejected the notion that the workers' compensation trial court lacked the authority to order, as part of a final award, payment of future medical expenses incurred more than 2 years after the date of the last payment, even if the medical expenses were reasonable and necessary and a result of the disabling injury. The Supreme Court recognized that the only limitation on medical benefits set forth in § 48-120 is that the treatment be reasonable and that the compensation court has the authority to determine the necessity, character, and sufficiency of the treatment furnished.

This broad construction nonetheless contemplates a causal connection between the compensable injury and the future medical care. "The employer, of course, may contest any future claims for medical treatment on the basis that such treatment is unrelated to the original work-related injury . . . or that the treatment is unnecessary or inapplicable." 262 Neb. at 476, 632 N.W.2d at 321.

[4] An often-cited treatise states this principle as follows: "There must, of course, be a causal relationship between the original compensable injury and the medical care." 5 Arthur Larson & Lex K. Larson, Larson's Workers' Compensation Law § 94.03[1] at 94-38 n.2 (2007). The writers cited a case in which a court of appeals affirmed an administrative decision determining that testing the worker for cardiac disease was not related to his work-related rib injury and declining to require the employer to pay for the testing. *Id*. (citing *Stewart v. Dist. of Col. D. of Emp. Sec.*, 606 A.2d 1350 (D.C. 1992)).

In the case before us, the trial judge determined that Provigil was necessary to address Zitterkopf's reaction to the pain medication. The judge relied upon expert medical testimony. The first

question posed is whether the evidence is sufficient to support the trial judge's finding.

[5] In testing the sufficiency of the evidence to support the findings of fact made by the Workers' Compensation Court, the evidence must be considered in the light most favorable to the successful party, and the factual findings by the compensation court have the same force and effect as a jury verdict in a civil case. *Murphy v. City of Grand Island*, 274 Neb. 670, 742 N.W.2d 506 (2007).

Viewed in that light, the evidence shows that Provigil is medically necessary for at least two purposes: (1) to treat the side effects of pain medication necessitated by the compensable injury and (2) to treat the unrelated sleep apnea.

The trial judge primarily relied upon the evidence of Dr. Elena Zerpa, Zitterkopf's treating psychiatrist, who prescribed Provigil. Zerpa responded to two questionnaires of Zitterkopf's counsel and later testified by deposition.

The questionnaires naturally focus on the compensable purpose. In the first questionnaire, signed on February 9, 2005, Zerpa opined that Zitterkopf's "current pain medications and pain from his 4/22/99 work[-]related injury contribute to his extreme fatigue" and that "the prescribed Provigil [is] necessary because of [Zitterkopf's] extreme fatigue." In a questionnaire signed by Zerpa on March 10, 2006, she agreed that Provigil was "primarily necessitated by the side effects from the pain medication which . . . Zitterkopf is taking because of the 1999 work[-]related injury."

Zerpa's August 2006 deposition provides a more nuanced analysis:

> Q. . . . [Y]ou testified that there are at least two different things that are causing his drowsiness?
>
> A. Right, so far.
>
> Q. The sleep apnea and the side effects. And . . . you signed a letter sometime in March of 2006, right?
>
> A. Uh-huh.
>
> . . . .
>
> Q. Would you still agree though that . . . one of the primary reasons for the Provigil is the side effects from the pain medication?

A. Again, I cannot say it's just one thing. I think it's part of —

Q. It's one of —

A. It's one of the reasons.

[6] While Aulick and United focus upon Zerpa's admission that she could not isolate each factor in analyzing medical necessity, the trial judge resolved Zerpa's testimony favorably to Zitterkopf. When asked whether Zitterkopf would need Provigil if he did not have sleep apnea, Zerpa stated, "I can't say that. I will not be able to answer that question." Similarly, Zerpa resisted focusing solely on the side effects of the injury-related pain medication. The sufficiency of the expert's opinion is judged in the context of the expert's entire statement. *Paulsen v. State*, 249 Neb. 112, 541 N.W.2d 636 (1996). We cannot say that the trial judge's view of this evidence was clearly wrong.

[7] Aulick and United prefer the evidence of another physician, but the law empowers the trial judge to resolve conflicting medical testimony. Dr. Oscar Sanchez, a pain control specialist, testified by deposition that (1) when he first saw Zitterkopf, all of Zitterkopf's symptoms were secondary to the sleep apnea, more than Zitterkopf's then-current medications; (2) Zitterkopf's extreme drowsiness was more likely the result of the sleep apnea than of a reaction to the pain medication; (3) Provigil was more indicated for the symptoms of sleep apnea; and (4) it was more likely that Provigil was for the sleep apnea. However, like Zerpa, Sanchez could not opine whether, assuming that Zitterkopf did not have sleep apnea, Provigil would be appropriate for Zitterkopf. When the record in a workers' compensation case presents conflicting medical testimony, an appellate court will not substitute its judgment for that of the compensation court. *Lowe v. Drivers Mgmt., Inc.*, 274 Neb. 732, 743 N.W.2d 82 (2007). We decline to substitute our judgment regarding the conflict between the evidence of Zerpa and that of Sanchez. The trial judge's resolution of such conflict was not clearly wrong.

Having determined that the trial judge was not clearly wrong in determining that Provigil was necessary for both a compensable and a noncompensable purpose, we turn to the second question presented by this appeal: whether the employer is

required to pay for such medication under the original award. The trial judge relied upon *Heiliger v. Walters & Heiliger Electric, Inc.*, 236 Neb. 459, 461 N.W.2d 565 (1990), in which the Nebraska Supreme Court rejected an enhanced degree of proof requirement in workers' compensation cases involving a preexisting condition or disability. In *Heiliger*, the court returned to its earlier articulation of the governing rule: To sustain an award in a workers' compensation case involving a preexisting disease or condition, it is sufficient to show that the injury resulting from an accident arising out of and in the course of employment and the preexisting disease or condition combined to produce disability, or that the employment injury aggravated, accelerated, or inflamed the preexisting condition. This burden of proof, the court stated, requires the claimant to correspondingly negate that the unrelated condition is the sole cause of the disability. See *id*. In the instant case, the trial judge reasoned that because the medication was necessary for both the compensable and the unrelated purposes, Zitterkopf established a sufficient causal relationship.

[8,9] Aulick and United argue that the "but for" portion of the requirement of proximate cause precludes their liability for the expense of Provigil. In order to recover under the Nebraska Workers' Compensation Act, a claimant has the burden of proving by a preponderance of the evidence that an accident or occupational disease arising out of and occurring in the course of employment proximately caused an injury which resulted in disability compensable under the act. *Sweeney v. Kerstens & Lee, Inc.*, 268 Neb. 752, 688 N.W.2d 350 (2004). A proximate cause is a cause that produces a result in a natural and continuous sequence and without which the result would not have occurred. *Id*. The latter portion of this definition articulates the "but for" requirement, which clearly applies in workers' compensation cases.

We agree that the employer would not be liable where treating the unrelated condition is the sole purpose of the medication. Under the analogy to *Heiliger*, Zitterkopf had the burden of proving that the sleep apnea was *not* the *sole* reason for the prescription of Provigil. Zitterkopf met this burden by proving that both the side effects and the apnea necessitated the

medication. But Aulick and United would impose a significantly different burden, requiring Zitterkopf to prove that medication "would not have been prescribed in the absence" of the work-related injury. Brief for appellants at 17. In effect, Aulick and United's standard would require Zitterkopf to prove that the sleep apnea did not provide *any* reason for the prescription. We find no merit to this argument.

We return to the articulation in *Foote v. O'Neill Packing*, 262 Neb. 467, 632 N.W.2d 313 (2001), which contemplated an employer contesting future claims for medical treatment on the basis that such treatment is unrelated to the original work-related injury. Requiring the employee to prove that the unrelated condition is not the sole cause for the treatment merely restates the necessity of a causal connection between the original compensable injury and the medical treatment—in other words, the employee must prove that the treatment is related to the original injury. In the instant case, the trial judge's finding that Zitterkopf met this burden was not clearly wrong.

CONCLUSION

Under the deferential standard of review accorded to factual determinations of a workers' compensation trial judge, we find no clear error in the determination that Provigil was necessary to treat both the work-related side effects of pain medication and the unrelated condition of sleep apnea. We also determine that the trial judge's decision correctly applied the law requiring a causal connection between the original work-related injury and the subsequent medical treatment. Accordingly, we affirm the order of the review panel which affirmed the order of the trial judge.

AFFIRMED.

DAVID McKEE, APPELLANT, V. CITY OF HEMINGFORD VILLAGE BOARD OF TRUSTEES, APPELLEE.

753 N.W.2d 854

Filed July 8, 2008. No. A-07-862.

1. **Administrative Law: Appeal and Error.** In reviewing an administrative agency decision on a petition in error, both the district court and the appellate court review the decision of the administrative agency to determine whether the agency acted within its jurisdiction and whether the decision of the agency is supported by sufficient relevant evidence.
2. **Administrative Law: Evidence.** The evidence is sufficient, as a matter of law, if an administrative tribunal could reasonably find the facts as it did based on the testimony and exhibits contained in the record before it.
3. **Administrative Law.** Administrative action must not be arbitrary or capricious.
4. **Administrative Law: Appeal and Error.** The reviewing court in an error proceeding is restricted to the record before the administrative agency and does not reweigh evidence or make independent findings of fact.
5. **Constitutional Law: Due Process.** The determination of whether the procedures afforded an individual comport with constitutional requirements for procedural due process presents a question of law.
6. **Judgments: Appeal and Error.** On a question of law, an appellate court is obligated to reach a conclusion independent of the court below.
7. **Due Process.** Property interests are not created by the U.S. Constitution, they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law.
8. **Administrative Law: Appeal and Error.** Orders made in the exercise of judicial functions by a board or tribunal inferior to the district court are reviewable by proceedings in error.
9. **Public Officers and Employees: Termination of Employment: Due Process: Notice.** Prior to termination of employment, a tenured public employee is entitled to oral or written notice of the charges against him or her, an explanation of the employer's evidence, and an opportunity to present his or her side of the story.
10. **Municipal Corporations: Police Officers and Sheriffs: Termination of Employment: Appeal and Error.** Neb. Rev. Stat. § 17-208(1) (Reissue 1997) authorizes a police officer who has been removed from office to request a review by the village board of his or her removal.
11. **Municipal Corporations: Ordinances: Police Officers and Sheriffs: Termination of Employment: Appeal and Error.** Neb. Rev. Stat. § 17-208(2) (Reissue 1997) requires villages to by ordinance adopt rules and regulations governing the removal or discipline of any police officer, which rules and regulations must include a procedure for making application for an appeal and provisions on the manner in which the appeals hearing shall be conducted.
12. **Termination of Employment: Due Process.** All process that is due is provided by a pretermination opportunity to respond, coupled with posttermination procedures.
13. **Termination of Employment: Due Process: Notice.** The constitutionally mandated pretermination notice may be oral or written.

14. **Employer and Employee: Words and Phrases.** Insubordination is an employee's willful or intentional disregard of, or refusal to obey, an employer's reasonable order, rule, or regulation, which is expressed or implied and is given or promulgated under lawful authority related to the employment.
15. **Municipal Corporations: Police Officers and Sheriffs: Termination of Employment: Due Process: Appeal and Error.** Neb. Rev. Stat. § 17-208(2) (Reissue 1997) directs a village board considering an appeal by a police officer from a removal to determine whether the challenged removal was necessary for the proper management and the effective operation of the police department in the performance of its duties under the statutes of the State of Nebraska.

Appeal from the District Court for Box Butte County: BRIAN C. SILVERMAN, Judge. Affirmed.

David B. Eubanks, of Pahlke, Smith, Snyder, Petitt & Eubanks, G.P., for appellant.

Steven W. Olsen, of Simmons Olsen Law Firm, P.C., for appellee.

SIEVERS, MOORE, and CASSEL, Judges.

CASSEL, Judge.

INTRODUCTION

By petition in error, David McKee challenged his termination for insubordination as chief of police for the Village of Hemingford. From an adverse judgment, McKee appeals. Because we conclude that McKee received adequate pretermination procedural due process and that sufficient evidence was presented to support the original decision, we affirm the judgment.

BACKGROUND

Although the caption of McKee's petition in error seems to identify the municipality as a "city," both parties cite Neb. Rev. Stat. § 17-208 (Reissue 1997), which is applicable only to villages, as a controlling statute. As the remainder of the record refers to Hemingford as a "village," we treat the municipality as such.

At the relevant times in 2006, the police department in Hemingford consisted of only three officers, including McKee. In early July, McKee properly requested vacation time for an extensive period from late September to mid-October. Margaret

A. Sheldon, the village administrator, approved McKee's request. McKee made significant arrangements based on the approval. However, later in July, circumstances began to change.

On July 31, 2006, one of the two other officers resigned. On August 15, the remaining officer resigned, in part due to McKee's denial of the full extent of her request for vacation time to see a sick relative. On August 29, the village's board of trustees held a meeting, discussing at length the vacation requests and actions. Sheldon later testified that the board spent 4½ hours in executive session "split between talking about . . . McKee's job performance and . . . asking how we could solve this problem because then we would be down to no officers if [McKee] took his vacation." According to the minutes, the board voted to

> deny . . . McKee's three weeks[']vacation starting September 27 due to the lack of personnel in the Police Department to cover the vacation time, and [McKee] must show up for duty on September 27, if not he is terminated, a resignation would be accepted up to 10 working days prior to September 27.

However, the board's involvement did not end with the August 29 meeting.

On the evening of September 5, 2006, the board held a regular meeting. The third item on the agenda was "Police," with a further description of "[f]ollow-up on action taken at August 29th meeting." According to Sheldon's subsequent testimony, on the afternoon of September 5, she talked to McKee at the request of the chairman of the board. Sheldon told McKee that during the meeting, he would be asked by the board whether he still intended to take his vacation starting on September 27. At the meeting, McKee received the question. He answered in the affirmative. A board member then moved to terminate McKee's employment effective immediately for insubordination. During approximately 20 minutes of discussion between McKee and the board, McKee stated on at least three occasions that he had not decided whether he would take the vacation as planned and that he had been trying to find officers to cover the time period that he hoped to be gone. The motion to terminate was then repeated, seconded, and approved by a vote of four to one.

A written notice of termination—bearing the signature of the board's chairperson—was prepared on September 6, 2006, and personally delivered to McKee on September 7. The notice stated:

> May this serve as official notice of termination of your position as Chief of Police for the Village of Hemingford. The reason for termination being insubordination. The date of termination being September 5, 2006. Please be further advised that pursuant to Village Ordinance you are entitiled [sic] to a hearing before the Village Board of Trustees.

McKee requested the appeal contemplated by § 17-208(2). On October 25, 2006, McKee received a hearing before the village board. An independent attorney employed by the village served as a hearing officer to conduct the proceeding. The chairperson of the village board, who had signed the notice of termination, did not participate as a board member in the hearing or decision on appeal. To the extent necessary, any further evidence from the hearing will be discussed in the analysis section below.

Although the action of the board in response to the hearing does not otherwise appear in the record, paragraph 7 of McKee's later petition in error alleged, and the village's answer admitted, that the board failed to take action on the appeal within 30 days after the adjournment of the hearing. Under § 17-208(2), such failure to act is "construed as a vote to uphold the removal or disciplinary action."

McKee filed a timely petition in error to the district court for Box Butte County, Nebraska. On July 26, 2007, the court found that the village board had jurisdiction to dismiss McKee and that the evidence supported the dismissal. The court stated, "The [v]illage [b]oard had a responsibility to provide police protection for the [v]illage, and when [McKee] refused to provide the same, the board took the only action available to them." The court dismissed McKee's petition in error.

McKee timely appeals to this court.

ASSIGNMENTS OF ERROR

McKee first assigns that the district court erred in finding that he was afforded pretermination due process. He also asserts that

the court erred in finding that he received sufficient notice of the formal charges and that there was sufficient evidence to support the termination.

STANDARD OF REVIEW

[1-4] In reviewing an administrative agency decision on a petition in error, both the district court and the appellate court review the decision of the administrative agency to determine whether the agency acted within its jurisdiction and whether the decision of the agency is supported by sufficient relevant evidence. *Hickey v. Civil Serv. Comm. of Douglas Cty.*, 274 Neb. 554, 741 N.W.2d 649 (2007). The evidence is sufficient, as a matter of law, if an administrative tribunal could reasonably find the facts as it did based on the testimony and exhibits contained in the record before it. *Pierce v. Douglas Cty. Civil Serv. Comm.*, 275 Neb. 722, 748 N.W.2d 660 (2008). In addition, the administrative action must not be arbitrary or capricious. *Id.* The reviewing court in an error proceeding is restricted to the record before the administrative agency and does not reweigh evidence or make independent findings of fact. *Id.*

[5,6] The determination of whether the procedures afforded an individual comport with constitutional requirements for procedural due process presents a question of law. *Hickey v. Civil Serv. Comm. of Douglas Cty., supra*. On a question of law, an appellate court is obligated to reach a conclusion independent of the court below. *Id.*

ANALYSIS

Pretermination Due Process.

[7] Because McKee enjoyed a property right in continued employment, he was entitled to pretermination due process. As the U.S. Supreme Court observed in *Cleveland Board of Education v. Loudermill*, 470 U.S. 532, 105 S. Ct. 1487, 84 L. Ed. 2d 494 (1985), property interests are not created by the Constitution, they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law. In the village's brief, it concedes that § 17-208 and the Hemingford personnel manual created this property right.

[8] In the subsequent appeal to the village board, McKee received a full administrative hearing. Clearly, this administrative hearing was a postdeprivation hearing. See *Pierce v. Douglas Cty. Civil Serv. Comm., supra*. Orders made in the exercise of judicial functions by a board or tribunal inferior to the district court are reviewable by proceedings in error. *Hawkins v. City of Omaha*, 261 Neb. 943, 627 N.W.2d 118 (2001). Thus, under Nebraska law, after the full administrative hearing McKee was entitled to judicial review—a right which he exercised.

[9] Prior to the termination, however, McKee was entitled only to a more limited process. The tenured public employee is entitled to oral or written notice of the charges against him or her, an explanation of the employer's evidence, and an opportunity to present his or her side of the story. *Cleveland Board of Education v. Loudermill, supra*. We address each requirement in turn.

First, McKee received oral notice of the charge against him. Prior to the September 5, 2006, board meeting, the board notified McKee of its complaint against him—his stated intention to take vacation time as originally scheduled in spite of the resignations of the village's only other police officers. McKee received such notice in the August 29 meeting, in which he actively participated. At this meeting, he certainly became aware of the board's concern regarding the effect upon public safety. The board's August 29 action—expressly denying the vacation time, requiring him to "show up" for duty, and authorizing a resignation up to 10 days before the scheduled date—communicated the board's resoluteness that he not respond in violation of the board's decision. Taken alone, the board's action of August 29 notified McKee that his job was in jeopardy of termination. McKee received additional notice from Sheldon. On September 5, but prior to the meeting, Sheldon orally notified McKee of the board's further objective to obtain a more definitive response from McKee regarding his intention to comply with or violate the board's requirement that he forgo the scheduled vacation. She notified him that the specific question would be raised at the September 5 meeting. Thus, McKee received sufficient pretermination notice of the complaint against him.

Second, it was clear that the village's evidence against him stemmed from his own statements. The subject was thoroughly discussed at the August 29, 2006, meeting. Sheldon's verbal notice on September 5 confirmed that the evidence against him consisted essentially of his own statements and communications to village officials. McKee's statements were examined at length in the September 5 meeting.

Finally, the September 5, 2006, meeting afforded McKee the opportunity to tell his side of the story. The evidence shows that he did so at length, primarily by attempting to explain that he had not made up his mind whether to accede to the board's earlier determination. Much of this discussion and explanation by McKee occurred during a 20-minute period after a motion had been made but not yet adopted to terminate his employment for insubordination. Clearly, the motion communicated in unmistakable fashion the board's determination to obtain compliance with its earlier action dispensing with McKee's scheduled vacation. The evidence shows that the village afforded McKee the pretermination process required by *Cleveland Board of Education v. Loudermill*.

[10,11] In arguing that the village failed to provide prior to the September 5, 2006, meeting the written notice required by § 3-703 of the Hemingford Municipal Code, McKee confuses the statutory method for effecting a termination with the constitutional due process requirement of pretermination notice. Section 17-208(1) authorizes a police officer who has been removed from office to "request a review by the village board of his or her removal." It also contemplates action by the village board "[a]fter a hearing." Section 17-208(2) requires villages to "by ordinance adopt rules and regulations governing the removal or discipline of any police officer," which rules and regulations must include "a procedure for making application for an appeal" and "provisions on the manner in which the appeals hearing shall be conducted." It also mandates that "[b]oth the police officer and the individual imposing the disciplinary action shall have the right at the hearing to be heard and to present evidence to the village board for its consideration." Section 3-703 implements the statutory requirements, providing:

> (1) No police officer, including the Village Marshal, shall be . . . removed[] or discharged except upon written notice stating the reasons for such . . . removal[] or discharge. Such notice shall also contain a statement informing the police officer of his or her right to a hearing before the Board of Trustees.
>
> (2) Any police officer so . . . removed[] or discharged may . . . file . . . a written demand for a hearing before the Board of Trustees. . . . The Board of Trustees shall give the police officer written notice of the hearing . . . .
>
> (3) At the hearing, the police officer shall have the right to: (a) respond in person to the charges and to present witnesses and documentary evidence; (b) confront and cross-examine available adverse witnesses; and [(c)] be represented by counsel.
>
> . . . .
>
> (5) Nothing in this section shall be construed to prevent the . . . immediate removal from duty of an officer, pending the hearing authorized by this section, in cases of gross misconduct, neglect of duty, or disobedience of orders.

[12,13] The notice contemplated by § 3-703(1) is not a pretermination notice; rather, it constitutes the very act of termination. The hearing provided by § 3-703 implements postdeprivation procedural due process, providing a full evidentiary hearing with the hallmarks of due process. State law provides the opportunity for subsequent judicial review. All process that is due is provided by a pretermination opportunity to respond, coupled with posttermination procedures. *Unland v. City of Lincoln*, 247 Neb. 837, 530 N.W.2d 624 (1995). The constitutionally mandated pretermination notice may be oral or written. See *Cleveland Board of Education v. Loudermill*, 470 U.S. 532, 105 S. Ct. 1487, 84 L. Ed. 2d 494 (1985). Because the village provided all required pretermination due process, we reject McKee's first assignment of error.

Sufficiency of Formal Notice of Termination.

McKee's second assignment of error includes two separate concepts, which we address in turn. We first examine whether the written notice of termination, quoted in the background

section above, complied with the requirements of § 17-208 and the ordinance, § 3-703.

We have already explained that the pretermination notice required by due process may be given orally and that the notice given was sufficient. In reviewing the notice required by § 3-703, we are not addressing a *pretermination* notice; rather, this section prescribes the content of the *formal act of termination*.

Section 17-208 does not itself specify any requirements for the formal act of termination. Section 17-208(2) requires the municipality to adopt by ordinance appropriate rules and regulations governing the removal or discipline of any police officer. It also prescribes mandatory features for these rules and regulations, which features we have already noted. The ordinance, in turn, implements these statutory mandates.

The ordinance, § 3-703, requires that the notice of formal discharge (1) be in writing, (2) state the reasons for the action, and (3) contain a statement informing the officer of his or her right to a posttermination hearing. The notice provided in the instant case complied with all three requirements.

Although it is not entirely clear, McKee seems to argue that the notice failed in two respects. First, he claims that it was not in writing. Obviously, the notice served upon him was in writing. In this argument, he seems to be claiming that the written notice had to be given at the very instant the motion was adopted on September 5, 2006. We disagree. Section 3-702(J) of the Hemingford Municipal Code contemplates that the village marshal will hold office for 1 year, "unless sooner removed by the Chairman of the Village Board, with the advice and consent of the Trustees." The action taken by the board on September 5 constituted the required "advice and consent." The actual removal was accomplished by the written action of the chairperson, signed on September 6. Thus, removal requires the accomplishment of two actions: the chairperson's "remov[al]" and the board's "advice and consent." Neither the state statute nor the village ordinances imposes the requirement of simultaneity urged by McKee. We find the formal notice of termination complied with the timing contemplated by the ordinances.

Second, McKee seems to argue that the notice failed to specify the reasons for termination. Once again, he confuses the due

process requirement of pretermination notice with the ordinance's requirement of specified reasons for the termination. The notice of termination specified the reason as insubordination. Section 3-703(1) requires no more. We reject this argument and turn to the remaining component of McKee's second assignment of error.

Sufficiency of Evidence.

McKee also argues that there was insufficient evidence to support the board's action upholding the termination. The evidence is sufficient, as a matter of law, if an administrative tribunal could reasonably find the facts as it did based on the testimony and exhibits contained in the record before it. *Pierce v. Douglas Cty. Civil Serv. Comm.*, 275 Neb. 722, 748 N.W.2d 660 (2008).

[14] Both parties rely upon the following definition of insubordination articulated in *Wadman v. City of Omaha*, 231 Neb. 819, 828, 438 N.W.2d 749, 755 (1989): "[I]nsubordination is an employee's willful or intentional disregard of, or refusal to obey, an employer's reasonable order, rule, or regulation, which is expressed or implied and is given or promulgated under lawful authority related to the employment."

[15] Section 17-208(2) directs a village board considering an appeal by a police officer from a removal to determine whether the "challenged removal . . . was necessary for the proper management and the effective operation of the police department in the performance of its duties under the statutes of the State of Nebraska."

McKee does not dispute that the chairperson of the village board or the board of trustees are empowered to exercise lawful authority over the chief of police. Rather, he argues that the board's August 29, 2006, action stating that a "resignation would be accepted up to 10 working days prior to September 27" somehow precluded the board from earlier demanding an assurance from McKee that he would comply with the August 29 action rescinding his scheduled vacation. We disagree.

On August 29, 2006, the board took formal action denying McKee the previously scheduled vacation. It also took action requiring that he "show up," i.e., perform his duties, for the required service. On September 5, the board ordered McKee to

answer whether he would obey the board's earlier decision requiring him to "show up." We reject McKee's argument that he was "ambushed" by the question. Brief for appellant at 8. Certainly, the meeting's agenda, amplified by Sheldon's specific verbal notice, gave McKee reason to anticipate the board's order.

An employee's intention to perform his or her duties lies at the heart of the employer-employee relationship. On September 5, 2006, the village board simply ordered McKee to assure the board that he would obey the board's decisions. He did not. This constituted insubordination. McKee does not dispute that the August 29 actions were lawful. Clearly, the board had a responsibility to make suitable arrangements to protect public safety. Section 17-208(1) authorizes the village board to appoint a marshal. Under Neb. Rev. Stat. § 17-213 (Reissue 1997), the marshal is the chief of police and is responsible to make arrests for violations of state law or village ordinance. If the board was to timely make such arrangements, it needed a decision from McKee. His equivocation placed the board in the same position as would have an outright refusal. We find sufficient evidence to support the board's action upholding McKee's termination for insubordination.

CONCLUSION

The board provided McKee with pretermination due process consisting of oral notice of the charge against him, an explanation of the employer's evidence, and an opportunity to present his side of the story. Section 17-208 mandated review by the village board of McKee's removal and required the village to adopt rules and regulations governing the appeal. The ordinance, § 3-703, implemented the statutory requirements and governed the formal act of termination and the posttermination appeal proceeding. The formal notice of termination complied with § 3-703. The record contains sufficient evidence to support the board's decision to terminate McKee's employment for insubordination, which took the form of McKee's refusal to assure the board that he would obey the board's actions denying his vacation and requiring him to perform the duties of his office. We affirm the judgment of the district court.

AFFIRMED.

GAYLE MANN, APPELLANT, V.
LAZELL RICH, APPELLEE.
755 N.W.2d 410

Filed July 22, 2008. No. A-07-1005.

1. **Constitutional Law: Parent and Child.** The relationship between parent and child is constitutionally protected and thus cannot be affected without procedural due process.
2. **Constitutional Law: Due Process.** Procedural due process includes notice to the person whose right is affected by the proceeding, that is, timely notice reasonably calculated to inform the person concerning the subject and issues involved in the proceeding; reasonable opportunity to refute or defend against the charge or accusation; reasonable opportunity to confront and cross-examine adverse witnesses and present evidence on the charge or accusation; representation by counsel, when such representation is required by the Constitution or statutes; and hearing before an impartial decisionmaker.
3. **Service of Process: Notice.** An informal, unsworn, and uncorroborated statement that an opposing party was timely notified of a hearing does not provide sufficient evidence to support a trial court's finding of satisfactory proof of service.

Appeal from the District Court for Douglas County: J. PATRICK MULLEN, Judge. Reversed and remanded for further proceedings.

Stephen D. Stroh and Ryan D. Caldwell, of Bianco, Perrone & Stroh, L.L.C., for appellant.

Jill A. Daley, of Gallup & Schaefer, for appellee.

INBODY, Chief Judge, and IRWIN and CARLSON, Judges.

IRWIN, Judge.

I. INTRODUCTION

Gayle Mann appeals from an order of the district court of Douglas County which modified a decree of paternity by giving Lazell Rich custody of the parties' minor children. On appeal, Mann argues, among other things, that the district court erred in finding that she had adequate notice of the modification hearing. Upon our de novo review of the record, we find insufficient evidence to establish that Mann received adequate notice of the modification hearing. Accordingly, we reverse and remand for further proceedings.

II. BACKGROUND

Mann and Rich are the parents of a child born October 21, 1998, and a child born November 29, 2000. On September 15, 2003, Mann filed a petition alleging that Rich is the biological father of the two children and requesting that the court grant custody of the children to Mann and order Rich to pay a reasonable sum of child support.

On August 21, 2006, a decree of paternity was entered. In the decree, the court determined that Rich is the father of the children, awarded custody of the children to Mann subject to Rich's reasonable rights of visitation, and ordered Rich to pay child support for the benefit of the parties' children.

On December 11, 2006, Rich, proceeding pro se, filed a motion requesting that the court modify the decree of paternity to grant him custody of the parties' minor children. The record indicates that Mann filed an answer to Rich's motion; however, a copy of this answer is not included in our record.

On February 23, 2007, Rich filed a notice of hearing. The notice stated that a hearing regarding a "custody change" was to be held March 21 at 1:30 p.m. Rich signed the notice of hearing, but did not include a certificate of service to establish that the notice had been sent to Mann.

On March 21, 2007, the hearing on Rich's motion to modify the decree of paternity was held. At the modification hearing, Rich appeared pro se and Mann did not appear. Prior to the evidentiary portion of the hearing, the court noted that the notice of hearing did not contain a certificate of service or any other indication that it had been sent to Mann and asked Rich if he had notified Mann of the hearing. Rich told the court that he had mailed a copy of the notice of hearing to Mann's home address. Rich also stated that he had not otherwise informed Mann of the hearing because she would not speak to him. After receiving this information from Rich, the court made the following findings: "Okay. This matter comes on for motion of change of custody for . . . Rich. It does appear to me that sufficient notice was given. . . . Mann, she is aware of these proceedings. She entered her general denial to the motion. So we will proceed with the hearing." At that time, Rich offered the testimony of numerous witnesses in support of his motion to modify the decree of

paternity. At the close of the evidence, the court took the matter under advisement.

On April 16, 2007, prior to the court's filing of an order regarding Rich's motion to modify the decree of paternity, Mann filed a motion which asserted that she had not received notice of the March 21 hearing. Mann's motion requested the court to "strike" from the record any evidence presented at the March 21 hearing.

On April 20, 2007, a hearing was held regarding the allegations in Mann's motion. At the hearing, Mann again asserted that she had not received notice of the hearing. She requested that the court disregard the evidence presented at the March 21 hearing and allow the parties to proceed with discovery and pretrial mediation in accordance with local court rules.

After hearing Mann's arguments, the court informed her that "Rich has sworn under oath that he sent to notice [sic] . . . Mann at the residence she resided at for several years prior to the hearing." The court went on to find:

> The trial will not be held again as the request has been made. There is enough brought to my attention that I think in light of the inadequate following of the rules leading up to trial, and at least the possible lack of notice, all though [sic] frankly, it's my belief she got the letter and she didn't open it. That's exactly what I think happened, but that's speculative at this point. But that was certainly my belief on the day of trial. Here's what I'll do. I'm going to allow the trial to be reopened. I will allow . . . Mann to induce evidence. However, I will not allow any of witnesses that were called and testified to be recalled and re examined, so if there's evidence to be induced, it will [have to be] by other witnesses called on the day of trial. There will be no requirement regarding methodation or other matters since we are in the middle of trial in that record.

In accordance with the court's findings, on June 29, 2007, another hearing was held regarding Rich's motion to modify the decree of paternity. At that hearing, Mann offered the testimony of Rich and herself. At the close of the evidence, the court issued an order modifying the decree of paternity and granting Rich

custody of the parties' minor children subject to Mann's reasonable rights of visitation. Mann appeals from this order.

III. ASSIGNMENTS OF ERROR

Mann assigns as error the court's finding that she received adequate notice of the March 21, 2007, hearing, the court's determination that she not be permitted to cross-examine witnesses who testified at the March 21 hearing, the court's denial of her motion for new trial, the court's failure to follow local court rules, and the court's decision to award custody of the parties' children to Rich.

IV. STANDARD OF REVIEW

Child custody determinations are initially entrusted to the discretion of the trial court, and although reviewed de novo on the record, the trial court's determination will normally be affirmed absent an abuse of discretion. *Wild v. Wild*, 15 Neb. App. 717, 737 N.W.2d 882 (2007).

Determination of whether procedures afforded an individual comport with constitutional requirements for procedural due process presents a question of law, regarding which an appellate court is obligated to reach its own conclusions independent of those reached by the trial court. *Conn v. Conn*, 13 Neb. App. 472, 695 N.W.2d 674 (2005).

V. ANALYSIS

We first address Mann's assignment of error that the court erred in finding that she received adequate notice of the March 21, 2007, hearing, as this issue is dispositive of this appeal. Mann argues that there was insufficient evidence to support the court's finding that she had adequate notice of the hearing. In her brief, she asserts, "Rich failed to include a Certificate of Service on the Notice of Hearing. . . . Further, . . . Rich failed to file a Proof of Service in lieu of the Certificate of Service. His testimony alone would not satisfy his burden unless it [was] compl[e]mented with other facts." Brief for appellant at 15.

We agree that the district court erred in finding that Mann had received adequate notice of the March 21, 2007, hearing. We

find insufficient evidence in the record to establish that Mann received any notice of this hearing. Accordingly, we reverse the district court's order modifying the decree of paternity and remand the case for further proceedings.

[1,2] The relationship between parent and child is constitutionally protected and thus cannot be affected without procedural due process. *State ex rel. Grape v. Zach*, 247 Neb. 29, 524 N.W.2d 788 (1994). Procedural due process includes notice to the person whose right is affected by the proceeding, that is, timely notice reasonably calculated to inform the person concerning the subject and issues involved in the proceeding; reasonable opportunity to refute or defend against the charge or accusation; reasonable opportunity to confront and cross-examine adverse witnesses and present evidence on the charge or accusation; representation by counsel, when such representation is required by the Constitution or statutes; and hearing before an impartial decisionmaker. *Id.*

In this case, Rich filed a motion requesting a modification of the decree of paternity. Specifically, Rich requested the decree be modified to award him custody of the parties' minor children. This request clearly related to Mann's relationship with her two minor children, and as a result, Mann was entitled to procedural due process. As a part of that due process, Mann was entitled to timely notice of the March 21, 2007, hearing. Rich did file a notice of hearing indicating that a hearing on his motion was to be held on March 21. However, the notice of hearing did not indicate on its face whether Rich provided Mann with timely notice of the hearing. Because there is no proof of service on the face of the notice of hearing, we examine the record to determine if there is any other proof sufficient to establish that Mann did, in fact, receive notice of the hearing.

The local court rules for the Fourth Judicial District outline acceptable means of providing to the court proof of service for any pertinent court document required to be served on an opposing party. We take judicial notice of these local rules because they were properly filed with the Clerk of the Nebraska Supreme Court. See *Ramsier v. Ramsier*, 227 Neb. 746, 419 N.W.2d 871 (1988). Rules of Dist. Ct. of Fourth Jud. Dist. 4-2(I) (rev. 2005) provides, in part:

> Proof Of Service Of Papers. Except as otherwise provided by statute or by order of the court, proof of service of any pleading, motion, or other paper required to be served shall be made by: (1) a certificate showing the name and address of any party on whom service was had; (2) written receipt of the opposing party; (3) affidavit of the person making service; (4) return of the county sheriff; or (5) other proof satisfactory to the court.

We find no evidence in the record to establish that Rich provided to the court proof of service of the notice of hearing through a certificate showing Mann's name and address, written receipt from Mann, an affidavit from Rich, or return of the county sheriff. Because there is no evidence of any of these acceptable forms of service of process, we examine the record to determine whether Rich presented any other proof of service which would be "satisfactory" to the court pursuant to local rule 4-2(I)(5).

Upon our de novo review of the record, we do not find satisfactory proof of service of the notice of hearing. The record demonstrates that the only "proof" of service came in the form of Rich's statement to the court that he had mailed a copy of the notice of hearing to Mann at her last known address. While the district court characterizes Rich's comments as being "sworn under oath," we find nothing in the record indicating that Rich was under oath at the time that he discussed the service of process with the court. Rather, the record demonstrates that the statements which transpired between the court and Rich were made somewhat informally prior to the start of the March 21, 2007, hearing. Rich did not offer any other "proof" to establish that he sent the notice of hearing to Mann, pursuant to the district court's local rule 4-2(I)(5).

[3] Rich's informal, unsworn, and uncorroborated statements do not provide sufficient evidence to support a trial court's finding of satisfactory proof of service. In light of local court rule 4-2(I)(5), which requires some proof of service which is "satisfactory" to the court, and in light of the important custodial issues at stake at the March 21, 2007, hearing, we find that Rich's unsworn statements that he mailed the notice of hearing to Mann did not sufficiently establish that Mann's due process

right to timely notice was satisfied. Without sufficient proof that Mann was afforded procedural due process, we find that the district court erred in finding that Mann received adequate notice of the March 21 hearing and in permitting the hearing to continue without Mann being present. We reverse the court's order modifying the decree of paternity and remand the case back to the district court for a new hearing on Rich's motion to modify the decree of paternity.

Because we find insufficient evidence to establish that Mann was provided with timely notice of the March 21, 2007, hearing and we remand the case for further proceedings, we decline to address Mann's remaining assignments of error. See *Wagner v. Union Pacific RR. Co.*, 11 Neb. App. 1, 23, 642 N.W.2d 821, 841 (2002) ("[a]n appellate court is not obligated to engage in an analysis which is not needed to adjudicate the case and controversy before it").

VI. CONCLUSION

Upon our de novo review of the record, we find insufficient evidence to establish that Mann received notice of the hearing on Rich's motion to modify the decree of paternity. We find that Mann was not afforded procedural due process, and we reverse the order of the district court which modified the decree of paternity and remand the case for a new hearing on the issue of custody of the parties' minor children.

REVERSED AND REMANDED FOR FURTHER PROCEEDINGS.

DAVID E. LAWSON, APPELLANT, V.
BRENDA LAWSON, APPELLEE.
753 N.W.2d 863

Filed July 22, 2008. No. A-07-1158.

1. **Modification of Decree: Appeal and Error.** Modification of a dissolution decree is a matter entrusted to the discretion of the trial court, whose order is reviewed de novo on the record, and which will be affirmed absent an abuse of discretion by the trial court.

2. **Judgments: Words and Phrases.** An abuse of discretion occurs when a trial court's decision is based upon reasons that are untenable or unreasonable or if its action is clearly against justice or conscience, reason, and evidence.
3. **Contempt: Final Orders: Appeal and Error.** An appellate court, reviewing a final judgment or order in a contempt proceeding, reviews for errors appearing on the record.
4. **Judgments: Appeal and Error.** When reviewing a judgment for errors appearing on the record, the inquiry is whether the decision conforms to the law, is supported by competent evidence, and is neither arbitrary, capricious, nor unreasonable.
5. **Contempt: Appeal and Error.** A trial court's factual finding in a contempt proceeding will be upheld on appeal unless the finding is clearly erroneous.
6. **Contempt: Proof.** A party's contempt must be established by proof beyond a reasonable doubt.

Appeal from the District Court for Cass County: RANDALL L. REHMEIER, Judge. Affirmed as modified, and cause remanded with directions.

Charles M. Bressman, Jr., of Anderson & Bressman Law Firm, P.C., L.L.O., for appellant.

No appearance for appellee.

Julie E. Bear, of Reinsch, Slattery & Bear, P.C., L.L.O., for children.

INBODY, Chief Judge, and IRWIN and CARLSON, Judges.

INBODY, Chief Judge.

INTRODUCTION

David E. Lawson contends that the Cass County District Court erred in denying his motion for enforcement of visitation and application for contempt against his ex-wife, Brenda Lawson, for allegedly interfering with his visitation rights. For the reasons set forth herein, we affirm as modified, and remand the cause with directions.

STATEMENT OF FACTS

David and Brenda were divorced on August 29, 2005, with Brenda granted custody of the parties' two minor children, Davis E. Lawson, born August 29, 1992, and Charlene M. Lawson, born August 27, 2001, subject to David's rights of visitation pursuant to the parties' stipulated parenting plan which was

incorporated, by reference, into the dissolution decree. David's visitation consisted of one evening during the week, every other week, from 5 until 8 p.m.; every other weekend from Friday at 5 p.m. until Sunday at 8 p.m.; and alternating holidays. Each party was also granted unlimited telephone contact when the children were not in that party's physical custody. The divorce was contentious, and David and Brenda's relationship has continued to deteriorate since the entry of the dissolution decree. David's relationship with his children deteriorated following the divorce also, but Brenda and David each contend that the other was mostly to blame for the decline.

Almost 1 year after the divorce, on August 9, 2006, David filed a motion for enforcement of visitation pursuant to Neb. Rev. Stat. § 42-364.15 (Reissue 2004), alleging that Brenda has engaged in parental alienation and interfered with his relationship with the parties' minor children in the following ways, among others: by repeatedly making derogatory, demeaning, and disparaging statements about David; by making false allegations and filing reports with governmental agencies relating to alleged abuse of the parties' children; by mailing correspondence to David with stamps stating "'Stop Family Violence'" in a manner intended to harass and/or provoke him; by refusing to have the minor children available for visitation; and in moving from Brenda's residence and refusing to provide David with a telephone number or an address where he can contact the children. David requested enforcement of the decree, that Brenda pay a bond to insure her compliance with the provisions of the dissolution decree, attorney fees and costs, and further, any other relief as the court deemed equitable. A hearing thereon was held on August 2 and September 6, 2007.

Barbara Jean Ray testified that she and her husband socialized with the Lawsons when the Lawsons were married. She testified that prior to the divorce, Davis was respectful toward David and well behaved and that David and Davis spent time together camping and hunting. Likewise, Mark Tincher testified that he has known the Lawsons for 10 to 12 years. He testified that prior to the divorce, Davis was respectful and well mannered and that when he observed Davis and David together, they acted appropriately and appeared to have fun together.

David testified that prior to the parties' divorce, he spent a lot of time with his children and they had strong, good relationships. David stated that he and Davis used to spend time together mushroom hunting, camping, riding four-wheelers, and attending auctions and that he taught Davis how to drive a pickup and how to work on equipment. David stated that he reviewed Davis' report cards, helped him with his homework, and met with his teachers. David and Charlene spent time together going to a few auctions, mushroom hunting, playing with dogs, and riding some of David's work equipment.

David claims that since the parties' divorce, Brenda has interfered with his visitation on more than one occasion. Brenda denies interfering with David's visitation and claims that it is not true that she wants to keep Davis and Charlene from seeing David, although she believed that the last time that David had visitation with his children was at the end of 2006.

Brenda admitted that she has told several people, including professionals, that David abused her and the minor children. She further reported that she suspected that David is a child abuser. She claimed that she saw David abuse Davis both physically and verbally. She further admitted that after she moved into a shelter during the summer of 2006, David did not have any visitation with the children for several months. David testified that during the time Charlene made allegations to Child Protective Services, which charges were dismissed, David received very little visitation for a period of 9 months. David testified that since the entry of the dissolution decree, he has had a total of six visitations with Davis in 3 years.

According to Brenda, she would drive the children to visitation with David, and Davis, who was 13 or 14 years old, would refuse to get out of the car. She stated that although she would tell him that he needed to go because the visitations were court ordered and she would promise him a "pizza night," Davis still refused to go.

Despite the fact that there was court-ordered counseling with Dr. Joseph Rizzo, Brenda canceled several appointments with him and took the minor children to other counselors without notifying David. According to David, he missed the first therapeutic visitation with Charlene because he did not understand

that the session was scheduled and because he was waiting for confirmation of the appointment, which never came. Since then, David has had two visits with Charlene at the therapist's office. According to David, he and Charlene got along fine and were happy to see each other.

David admitted that during the last 2 years, he had not sent his children any birthday gifts or cards or Christmas gifts, but stated that he did not know where they lived. He further stated that he did not call his children, because until 3 or 4 months ago, he did not have any telephone numbers for them. He further testified that since he has obtained the telephone numbers, he has not called, because he is afraid that he will get arrested. David testified that although he was recently married, he did not invite his children to his wedding.

David testified that he has disciplined Davis by talking to him, but that he has also spanked him on the bottom with his hand and with a belt. David further testified that Brenda often sent him letters with stamps on them that stated "Stop Family Violence."

Brenda acknowledged that she does not have a disability which prevents her from working, but that she is not working because she is a full-time student. She further admitted that David paid her $25,000 pursuant to the dissolution decree, the day after the decree was entered. Despite being ordered by the court to pay $1,500 of Dr. Glenda Cottam's fees, at the time of the August 2007 hearing, Brenda had not paid any of that amount. However, Brenda admitted that David was current on his child support. Further, David has paid for all of the counseling services by Rizzo and he paid the $1,500 court-ordered fee for Cottam.

Rizzo, a licensed clinical psychologist, testified that his practice includes helping people dealing with family problems, divorce problems, and reunification of children following a divorce. Rizzo testified that he was retained to make an assessment and to try to assist in the relationship between David and the minor children. Rizzo testified that Brenda and David's divorce was a very high conflict divorce and that Davis was an anxious and very angry child and was very frank about not wanting to see David. Rizzo testified that Brenda was very

injured and bitter toward David and that Brenda was not following the parenting plan. Further, Rizzo noted that in July 2007, Davis' anger was becoming more intense toward David, and that because there was no real contact with David which would account for the increase, the increased anger had to be attributable to a different source. Rizzo further testified that parental alienation was occurring with respect to Brenda's alienating the minor children against David. Rizzo also testified that during one of Davis' final meetings with him, Davis confronted him about one of the letters that Rizzo had sent to Davis' parents; Davis told Rizzo that Brenda had given Davis the letter and that he had read it.

The other licensed clinical psychologist, Cottam, submitted a report which was received into evidence. This report reflects, in part:

> I believe that this case may be rather typical for a high conflict family. My impression is that [David] probably does have an anger problem (as well as an addiction to Percocet) - and has said/done things to [Brenda] and possibly to the children - so that Davis may have some genuine dislike of his father. [David] probably lacks insight into how his own behaviors have contributed to this sad family situation - in which his son does not want to see him. On the other hand, [Brenda] is obviously so angry, vindictive, and dramatic that I believe she has probably exaggerated her claims of being a "victim" - to her own benefit. I have no doubt that she has shared her negative impressions of [David] with one or both of the children. I believe she will try to sabotage any effort to improve relations between [David] and the children. I perceive both parents as being very "gamey" - despite their best efforts to make a positive impression in my office. Both parents need individual counseling. The children are horribly in the middle of this conflict - and, if they are like most children, they will have the strongest alliance to the parent with whom they reside - in this case, [Brenda]."

Davis, who was 15 years old at the time of the hearing, testified that he had been both physically and verbally abused by David a couple of times each week for as long as he could remember.

Davis further testified that he had personally witnessed David physically abuse Brenda. Davis testified that he was hit with screwdrivers and rubber tie-down straps. Davis described one occasion when he accidentally drove a four-wheeler over a stick and got the stick lodged in the four-wheeler's fan. Davis claims that upon removing the stick from the four-wheeler, David used the stick to hit him on the back and the arms.

Davis further testified that he did not wish to exercise any form of visitation with David at that time, including therapeutic visitation, because Davis did not feel that the therapeutic visitation was helpful in repairing his relationship with David. Davis acknowledged walking out of the scheduled visits with Rizzo.

Davis claims that Brenda encourages him to attend visitations with David, but that he does not want to talk to David, attend visitations, or have a good relationship with David because of things that David has done in the past. He further claims that Brenda never says bad things about David to him and never talks about David. Davis further stated that Brenda showed him one of the letters written by Rizzo, but Davis stated that he did not read the letter. Brenda testified that she allowed Davis to read correspondence from Rizzo.

On October 4, 2007, the district court declined to hold Brenda in contempt, finding that

> although the court believes that [Brenda] has helped sabotage [David's relationship] with the children, the court further believes that [David] is equally at fault with regard to creating the problems that are confronting him with regard to visitations at this time. Accordingly, the court does not find that it would be proper to find [Brenda] in contempt to force the visitations. . . . [T]he same may be counterproductive at this time without further intervention and the restoration of a relationship between [David] and, in particular, Davis.

Regarding the motion to enforce visitation, the court found that Brenda shall not interfere with David's relationship with the minor children, that she shall not make any negative remarks about David to the minor children, and that she shall encourage the children to exercise their visitations with David. No other

relief was granted pursuant to David's motion to enforce visitation. David has timely appealed to this court.

ASSIGNMENTS OF ERROR

On appeal, David contends that the district court erred in failing to grant his motion for enforcement of visitation and in finding that Brenda was not in contempt of court.

STANDARD OF REVIEW

[1,2] Modification of a dissolution decree is a matter entrusted to the discretion of the trial court, whose order is reviewed de novo on the record, and which will be affirmed absent an abuse of discretion by the trial court. *Finney v. Finney*, 273 Neb. 436, 730 N.W.2d 351 (2007). An abuse of discretion occurs when a trial court's decision is based upon reasons that are untenable or unreasonable or if its action is clearly against justice or conscience, reason, and evidence. *Zahl v. Zahl*, 273 Neb. 1043, 736 N.W.2d 365 (2007).

ANALYSIS

Denial of Motion to Enforce Visitation.

David contends that the court erred in failing to grant his motion for enforcement of visitation.

David filed his motion for enforcement of visitation under § 42-364.15, which provides:

> In any proceeding when a court has ordered a parent to pay, temporarily or permanently, an amount for the support of a minor child and in the same proceeding has ordered visitation with any minor child on behalf of such parent the court shall enforce its visitation orders as follows:
>
> (1) Upon the filing of a motion which is accompanied by an affidavit stating that either parent has unreasonably withheld or interfered with the exercise of the court order after notice to the parent and hearing, the court shall enter such orders as are reasonably necessary to enforce rights of either parent including the modification of previous court orders relating to visitation. The court may use contempt powers to enforce its court orders relating to visitation. The court may require either parent to file a bond or otherwise

> give security to insure his or her compliance with court order provisions.
>
> (2) Costs, including reasonable attorney's fees, may be taxed against a party found to be in contempt pursuant to this section.

Because David brought his motion pursuant to this section, the district court was limited in the relief which it was authorized by statute to grant. The district court found that Brenda shall not interfere with David's relationship with the minor children, that she shall not make any negative remarks about David to the minor children, and that she shall encourage the children to exercise their visitations with David. However, the court did not grant any other relief pursuant to David's motion to enforce visitation. Based upon our de novo review of the record, and the specific circumstances present in this case, we find that the district court fashioned relief in a manner which the court found was in the minor children's best interests. We cannot deem the court's determination was an abuse of discretion.

Failure to Find Brenda in Contempt.

David contends that the district court erred in failing to find Brenda in contempt of court for interfering with his visitation.

[3-6] An appellate court, reviewing a final judgment or order in a contempt proceeding, reviews for errors appearing on the record. *Klinginsmith v. Wichmann*, 252 Neb. 889, 567 N.W.2d 172 (1997); *Novak v. Novak*, 245 Neb. 366, 513 N.W.2d 303 (1994). When reviewing a judgment for errors appearing on the record, the inquiry is whether the decision conforms to the law, is supported by competent evidence, and is neither arbitrary, capricious, nor unreasonable. *Klinginsmith v. Wichmann, supra*; *Law Offices of Ronald J. Palagi v. Dolan*, 251 Neb. 457, 558 N.W.2d 303 (1997); *Dillard Dept. Stores v. Polinsky*, 247 Neb. 821, 530 N.W.2d 637 (1995). A trial court's factual finding in a contempt proceeding will be upheld on appeal unless the finding is clearly erroneous. *Klinginsmith v. Wichmann, supra*; *Novak v. Novak, supra*. A party's contempt must be established by proof beyond a reasonable doubt. *Klinginsmith v. Wichmann, supra*.

In the instant case, the district court declined to find Brenda in contempt, finding that

> although the court believes that [Brenda] has helped sabotage [David's relationship] with the children, the court further believes that [David] is equally at fault with regard to creating the problems that are confronting him with regard to visitations at this time. Accordingly, the court does not find that it would be proper to find [Brenda] in contempt to force the visitations. . . . [T]he same may be counterproductive at this time without further intervention and the restoration of a relationship between [David] and, in particular, Davis.

We cannot say that this determination was arbitrary, capricious, or unreasonable. Therefore, we affirm the district court's decision in this regard. However, because we believe that Brenda needs some motivation in order to adhere to her obligations under the dissolution decree and the district court's October 4, 2007, order, we find that she shall be required to post a cash bond to ensure her compliance with the district court's orders. If Brenda does not comply with the district court's orders, she is subject to forfeiting the bond. We remand the cause to the district court for a determination of an appropriate amount for the cash bond.

CONCLUSION

In sum, we find that due to the specific circumstances present in this case, the district court did not abuse its discretion in failing to grant David broader relief pursuant to his motion to enforce visitation. We further find that the district court's failure to find Brenda in contempt was not arbitrary, capricious, or unreasonable. However, we do find that Brenda should be required to post a cash bond to ensure her compliance with the district court's orders, and we remand the cause for the district court to determine an appropriate amount of that cash bond. Therefore, the order of the district court is affirmed as modified and this cause is remanded with directions.

AFFIRMED AS MODIFIED, AND CAUSE REMANDED WITH DIRECTIONS.

IRWIN, Judge, concurring in part, and in part dissenting.

I concur with the majority's analysis and affirmance of the district court's denial of David's motion for enforcement of

visitation and refusal to find Brenda in contempt of court. Despite agreeing with the majority on all of these findings, I write separately because I cannot agree with the final paragraph of analysis in the majority opinion, in which paragraph the majority, without explanation, concludes that Brenda should be required to post a cash bond to ensure compliance with the very orders that were the subject of the enforcement and contempt issues.

With respect to David's motion for enforcement of visitation, I agree that the record presented supports the conclusion that the district court fashioned relief in a manner which was in the minor children's best interests and did not abuse its discretion. The majority notes the requirements of Neb. Rev. Stat. § 42-364.15 (Reissue 2004) and notes that consistent with that statute, the district court ordered Brenda to not interfere with David's relationship with the children, to not make any negative remarks about David to the children, and to encourage the children to exercise visitations with David. The majority further concludes that under the record presented and "the specific circumstances present in this case," the relief fashioned was appropriate. Thus, there was no abuse of discretion or other error concerning the district court's ruling on the motion for enforcement of visitation. I agree.

With respect to the contempt issue, I also agree that the record presented supports the conclusion that the district court's decision was not arbitrary, capricious, or unreasonable, and the record supports the district court's finding that the visitation problems have been the fault of both parties. Indeed, the lengthy factual background provided by the majority supports the district court's conclusions. The district court was presented with evidence that Brenda had encouraged the children to exercise visitation, despite her assertions that David had abused them. There was evidence presented that Davis refused to go, despite Brenda's encouragement. Davis was 15 years old at the time of the hearing, and he testified that he had been both physically and verbally abused by David weekly for as long as he could remember, and Davis recounted incidents involving being struck with screwdrivers and rubber tie-down straps. Davis testified that he did not wish to exercise any form of visitation with

David. Further, there was conflicting psychological evidence presented, including one report that David has an anger problem contributing to Davis' dislike and desire not to exercise visitation. All of this evidence led the majority to affirm the district court's finding that both parties have been at fault and that it was inappropriate to hold Brenda in contempt. I agree.

Despite affirming every finding and conclusion of the district court, in the final paragraph of the analysis, the majority determines that Brenda should be required to post a cash bond to ensure her compliance with the visitation order, but provides no rationale or explanation to support such a conclusion. Upon a de novo review of the record presented in this case, the majority has concluded that there was no abuse of discretion, no error appearing on the record, and no clearly erroneous factual determination. The majority has concluded that the decision of the district court was supported by competent evidence and was not arbitrary, capricious, or unreasonable. The majority has affirmed the district court's determination that both parties were at fault concerning the visitation issues, and the evidence presented and recounted in the factual background of the opinion supports that conclusion. Despite all of this, the majority modifies the district court's order and requires Brenda to post a cash bond to secure her compliance with the visitation order.

Section 42-364.15 provides that the district court "may" require either parent to file a bond or otherwise give security to ensure his or her compliance with the court's visitation orders. In this case, the district court chose not to require either parent to file a bond or other security, which was consistent with the court's finding that both parties were at fault and that Brenda was not in contempt. It is fundamental in this state that the word "may," when used in a statute, is given its ordinary, permissive, and discretionary meaning unless it would manifestly defeat the statutory objective. *State v. County of Lancaster*, 272 Neb. 376, 721 N.W.2d 644 (2006). When the word "may" appears, permissive or discretionary action is presumed. *Id.* There is no assertion that any statutory objective would be manifestly defeated by giving the word "may" in § 42-364.15 its ordinary and discretionary meaning. As such, § 42-364.15 grants the district court discretion to impose a bond, and its decision

in that regard should be upheld in the absence of an abuse of that discretion, something that the majority has not suggested in its analysis.

Section 42-364.15 required the district court to enter such orders as were necessary to enforce the rights of the parents. The court did this, and this court has found the court's orders to be appropriate. Section 42-364.15 grants the district court discretion to use contempt powers to enforce its orders. The court declined to exercise this discretionary power, finding that both parties were at fault, and this court has found that the court did not abuse its discretion or otherwise err in so finding. Section 42-365.15 also grants the district court discretion to require a bond to secure compliance with its orders. The court declined to exercise this discretionary power, and without a finding that the court abused its discretion in some fashion, this court should affirm that decision as well. Inasmuch as the majority has found no abuse of discretion—and no clear error or other error appearing on the record—and has provided no rationale to support imposing a bond in a case where both parties were at fault and evidence was presented to support the district court's holdings, I cannot join in the majority's imposition of a bond where the district court declined to impose one. I would affirm the district court's order in its entirety.

AARON M. FERER, APPELLANT AND CROSS-APPELLEE, V. AARON FERER & SONS CO., A NEBRASKA CORPORATION, ET AL., APPELLEES AND CROSS-APPELLANTS.

755 N.W.2d 415

Filed July 29, 2008. No. A-07-773.

1. **Jurisdiction: Appeal and Error.** It is the duty of an appellate court to determine whether it has jurisdiction over the matter before it.
2. ____: ____. An appellate court acquires no jurisdiction unless the appellant has satisfied the requirements for appellate jurisdiction.
3. **Judgments: Final Orders: Appeal and Error.** Neb. Rev. Stat. § 25-1912(2) (Cum. Supp. 2006) permits a notice of appeal from a nonfinal decision to operate as a notice of appeal from the final judgment only when a lower court announces a decision that would be appealable if immediately followed by the entry of judgment.

4. **Judgments: Final Orders.** The content of a document, rather than the intention of the judge or any interpretation of a party, dictates whether the document constitutes the final determination of the rights of the parties.
5. **Judgments.** In interpreting a document, neither what the parties thought the judge meant nor what the judge thought he or she meant is of any relevance; what a document means as a matter of law is determined from the four corners of the document.
6. **Jurisdiction: Appeal and Error.** When an appellate court is without jurisdiction to act, the appeal must be dismissed.

Appeal from the District Court for Douglas County: PETER C. BATAILLON, Judge. Appeal dismissed.

David A. Domina and Nicole A. Parks, of Domina Law Group, P.C., L.L.O., for appellant.

Steven E. Achelpohl for appellee Aaron Ferer & Sons Co.

Michael A. Nelsen, of Hillman, Forman, Nelsen, Childers & McCormack, for appellees Matthew D. Ferer and Whitney H. Ferer.

Michael F. Kinney and Daniel J. Epstein, of Cassem, Tierney, Adams, Gotch & Douglas, for appellees Erickson & Sederstrom, P.C., and Charles V. Sederstrom, Jr.

INBODY, Chief Judge, and SIEVERS and CARLSON, Judges.

CARLSON, Judge.

INTRODUCTION

Pursuant to this court's authority under Neb. Ct. R. App. P. § 2-111(B)(1), this case was ordered submitted without oral argument. Aaron M. Ferer (Ferer) appeals from an order of the district court for Douglas County finding that the statute of limitations bars his claims and dismissing his causes of action. For the reasons set forth below, we determine that we lack jurisdiction over Ferer's action because he did not file a timely notice of appeal, and therefore, we dismiss his causes of action.

BACKGROUND

In Ferer's first amended complaint, filed June 11, 2004, the following defendants were named: Aaron Ferer & Sons Co.; Erickson & Sederstrom, P.C.; Charles V. Sederstrom, Jr.;

Matthew D. Ferer, personally and as the parent and natural guardian of Emma Ferer; Whitney H. Ferer, personally and as the parent and natural guardian of Nicholas R. Ferer and Hannah C. Ferer; and Allyson L. Ferer, personally and as the parent and natural guardian of Claire A. Dubin and Samuel L. Dubin. Ferer's complaint arises out of his late father's gift of company stock to two of Ferer's brothers, Whitney and Matthew, and includes causes of action for declaratory judgment, constructive fraud, breach of fiduciary duty, wrongful registration, and unjust enrichment.

On October 3, 2006, the trial court granted a motion for summary judgment which had been filed by Aaron Ferer & Sons Co., Whitney, and Matthew, stating that the statute of limitations barred Ferer's claims against these parties. The court dismissed Aaron Ferer & Sons Co., Whitney, and Matthew from the lawsuit, but did not state whether Matthew and Whitney were being dismissed only in their individual capacities or also in their capacities as parents of their children.

In an order filed on October 30, 2006, the trial court granted a summary judgment motion filed by Sederstrom and Erickson & Sederstrom. The court noted that Ferer's claims against these parties were also barred by the statute of limitations and dismissed these two additional parties from the lawsuit.

On June 28, 2007, the trial court dismissed the action as to Allyson, but only in her capacity as parent and guardian of Claire and Samuel. Ferer appealed to this court on July 13.

In an order to show cause dated August 29, 2007, we noted that Ferer's action was dismissed as to all the parties, except that it appeared that the action remained pending as to Matthew and Whitney in their representative capacities and as to Allyson in her individual capacity. We also stated that if Ferer's action had not been fully dismissed as to all parties, the order was not final and appealable under Neb. Rev. Stat. § 25-1315 (Cum. Supp. 2006). Therefore, we issued the order, "[P]laintiff/appellant [Ferer] is directed to show that all parties have been 'fully dismissed' within 15 days of the date of this Order; and failing same, this appeal will be dismissed pursuant to [Neb. Ct. R. of Prac.] 7A(2) [(rev. 2001)]" (now codified as Neb. Ct. R. App. P. § 2-107(A)(2)).

In an order filed September 18, 2007, the trial court noted, "The prior Orders of this Court were intended to have dismissed all Defendants in their individual and representative capacities. As such, all Defendants are so dismissed as set forth in this Court's prior orders." Ferer did not file a new notice of appeal subsequently to this order.

ASSIGNMENTS OF ERROR

On appeal, Ferer argues that the trial court erred in finding that the statute of limitations bars his lawsuit and in granting the defendants' motions for summary judgment and dismissing his lawsuit against them.

ANALYSIS

[1,2] It is the duty of an appellate court to determine whether it has jurisdiction over the matter before it. See *Goodman v. City of Omaha*, 274 Neb. 539, 742 N.W.2d 26 (2007). An appellate court acquires no jurisdiction unless the appellant has satisfied the requirements for appellate jurisdiction. *Id.*

In the defendants' cross-appeal, they argue that we lack jurisdiction over this appeal since not all of the parties were dismissed in each of their capacities at the time Ferer filed his first appeal and because after the trial court dismissed all of the parties on September 18, 2007, Ferer failed to file a new notice of appeal. Ferer cites Neb. Rev. Stat. § 25-1912 (Cum. Supp. 2006) in support of his position that his July 13 appeal was timely because it relates forward. Section 25-1912(2) states:

> A notice of appeal or docket fee filed or deposited after the announcement of a decision or final order but before the entry of the judgment, decree, or final order shall be treated as filed or deposited after the entry of the judgment, decree, or final order and on the date of entry.

Therefore, the plain language of § 25-1912(2) provides for the relation forward of a notice of appeal or docket fee only when filed or deposited "after the announcement of a decision or final order," but before "entry of the judgment" pursuant to Neb. Rev. Stat. § 25-1301 (Cum. Supp. 2006). *J & H Swine v. Hartington Concrete*, 12 Neb. App. 885, 687 N.W.2d 9 (2004). Accord *In re Guardianship & Conservatorship of Woltemath*,

268 Neb. 33, 680 N.W.2d 142 (2004). Section 25-1912(2) was not intended to validate anticipatory notices of appeal filed prior to the announcement of a final judgment. *In re Guardianship & Conservatorship of Woltemath, supra*; *J & H Swine, supra.*

[3] In *In re Guardianship & Conservatorship of Woltemath*, the Nebraska Supreme Court held that § 25-1912(2) permits a notice of appeal from a nonfinal decision to operate as a notice of appeal from the final judgment only when a lower court announces a decision that would be appealable if immediately followed by the entry of judgment. In the instant case, we conclude that the trial court's July 13, 2007, dismissal, from which Ferer appealed, did not announce a "judgment, decree, or final order" within the meaning of § 25-1912(2) because it did not dispose of all of the claims against all of the parties in each of their capacities. Therefore, Ferer's notice of appeal was filed prematurely and cannot relate forward pursuant to § 25-1912(2).

Ferer also argues that his appeal was timely because the trial court, in its September 18, 2007, order, stated that its prior orders were "intended to have dismissed all Defendants in their individual and representative capacities." We note though that what the trial court intended is not something we can consider. Rather, we are restricted to looking within the four corners of the trial court's previous orders to determine whether all of the defendants were dismissed in their individual and representative capacities.

[4,5] The content of a document, rather than the intention of the judge or any interpretation of a party, dictates whether the document constitutes "'the final determination of the rights of the parties.'" *Peterson v. Peterson*, 14 Neb. App. 778, 785, 714 N.W.2d 793, 799 (2006), *disapproved on other grounds, Wagner v. Wagner*, 275 Neb. 693, 749 N.W.2d 137 (2008). See § 25-1301(1). In *Neujahr v. Neujahr*, 223 Neb. 722, 393 N.W.2d 47 (1986), the Nebraska Supreme Court held that in interpreting a decree of dissolution, neither what the parties thought the judge meant nor what the judge thought he or she meant was of any relevance and that what a document means as a matter of law is determined from the four corners of the document.

In the instant case, our review of the record shows that the trial court dismissed Allyson only in her representative capacity, not her individual capacity, and that although the trial court dismissed Matthew and Whitney, it is unclear whether the trial court dismissed Matthew and Whitney only in their individual capacities or also in their capacities as parents of their children.

[6] Therefore, because the orders from which Ferer appealed did not dismiss all of the parties in each of their capacities, the trial court's orders were not final and appealable until the trial court dismissed each party in all capacities on September 18, 2007. Ferer failed to appeal from the September 18 order. Therefore, we lack jurisdiction over his appeal and must dismiss it. See *In re Guardianship & Conservatorship of Woltemath*, 268 Neb. 33, 680 N.W.2d 142 (2004) (when appellate court is without jurisdiction to act, appeal must be dismissed). To avoid this result, we suggest that trial judges include, at the end of any entry intended to be a final order, a phrase to the effect that "any request for relief by any party not specifically granted by this order is denied."

CONCLUSION

After reviewing the record, we conclude that we lack jurisdiction over Ferer's appeal because he did not file a timely appeal, and therefore, we dismiss his appeal.

APPEAL DISMISSED.

STATE OF NEBRASKA, APPELLEE, V.
JOSEPH CONNOR, APPELLANT.
754 N.W.2d 774

Filed July 29, 2008. No. A-07-1230.

1. **Criminal Law: Convictions: Evidence: Appeal and Error.** In reviewing a criminal conviction, an appellate court does not resolve conflicts in the evidence, pass on the credibility of witnesses, or reweigh the evidence. Such matters are for the finder of fact, and a conviction will be affirmed, in the absence of prejudicial error, if the properly admitted evidence, viewed and construed most favorably to the State, is sufficient to support the conviction.

2. ____: ____: ____: ____. When reviewing a criminal conviction for sufficiency of the evidence to sustain the conviction, the relevant question for an appellate court is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.
3. **Motions for Continuance: Appeal and Error.** A motion for continuance is addressed to the discretion of the trial court and will not be disturbed on appeal absent a showing of an abuse of discretion.
4. **Sentences: Appeal and Error.** Whether an appellate court is reviewing a sentence for its leniency or its excessiveness, a sentence imposed by a district court that is within the statutorily prescribed limits will not be disturbed on appeal unless there appears to be an abuse of the trial court's discretion.
5. **Judges: Words and Phrases.** A judicial abuse of discretion exists only when the reasons or rulings of a trial judge are clearly untenable, unfairly depriving a litigant of a substantial right and denying a just result in matters submitted for disposition.
6. **Value of Goods: Vendor and Vendee.** Price tags on items are not sufficient to establish the value of those items.
7. **Theft: Value of Goods: Proof.** The State must prove, beyond a reasonable doubt, the value of the property that is the subject of the theft charge.
8. ____: ____: ____. Value to be proved concerning a theft is market value at the time and place where the property was criminally appropriated. There is no better way of showing the market value of any article than the price at which it and others of its class are being offered and sold on the market.
9. **Theft: Value of Goods.** In reference to the crime of theft, value is established by evidence concerning the price at which property identical or reasonably similar to the property stolen is offered for sale and sold in proximity to the site of the theft.
10. **Value of Goods: Proof.** Evidence of the purchase price of the goods is competent evidence of fair market value only where the goods are so new, and thus, have depreciated in value so insubstantially as to allow a reasonable inference that the purchase price is comparable to the fair market value.
11. **Motions for Continuance: Appeal and Error.** Where due diligence by the moving party has not been shown, the ruling of the trial court overruling a motion for a continuance for the purpose of securing additional evidence will not be disturbed.

Appeal from the District Court for Sarpy County: WILLIAM B. ZASTERA, Judge. Affirmed in part, and in part reversed and remanded with directions.

Patrick J. Boylan, Chief Deputy Sarpy County Public Defender, for appellant.

Jon Bruning, Attorney General, and George R. Love for appellee.

INBODY, Chief Judge, and SIEVERS and CARLSON, Judges.

SIEVERS, Judge.

Joseph Connor was convicted of theft by unlawful taking in the district court for Sarpy County and sentenced to a term of 1 to 3 years' imprisonment. He argues that the value of the items he stole was not established by sufficient evidence and that his sentence was excessive. We find that the State's evidence of value was insufficient to support the gradation of the offense for which Connor was sentenced, and therefore, we remand the cause to the trial court for resentencing.

FACTUAL AND PROCEDURAL BACKGROUND

On September 22, 2006, Connor was at a home improvement store in Bellevue, Nebraska. Several store employees witnessed Connor putting high-priced items in a shopping cart and then leaving the shopping cart in the garden center. The garden center has an area where customers can enter with their vehicles for the purpose of loading items into their cars. Connor left the cart in the garden center but soon returned to the garden center driving his vehicle, a Suburban. Without paying for the items, Connor loaded them into his Suburban and attempted to exit the garden center. At the exit, he was stopped by police who searched his Suburban and discovered the items that Connor had taken from the store without paying for them.

The store's "front-end" manager, Melissa Schwinn, who had been one of the employees observing Connor, identified the items in the Suburban as those that Connor had taken from the store. Schwinn provided the police with a typed description of the items and their retail value, and at Connor's jury trial on September 12, 2007, she testified as to each item's "retail sales price" and gave a figure of $1,477.16 as their "total retail value." The involved items included chains, cable pullers, router bits, a circular saw blade, saw blades, a laser-beam level, a pull scraper, a kitchen faucet, blinds, brackets, and some other smaller items. At trial, Schwinn was asked about the "retail sales price" of each of the items Connor had taken, and ultimately she was asked what the "*total retail value*" (emphasis supplied) was of the items Connor had taken from the store.

Schwinn testified that the total retail value of the items was $1,477.16; however, she did not testify as to whether the store had sold any similar items to any customer for the "retail sales price" that she gave for the involved items in response to the prosecutor's question.

At trial, Connor made a motion for a continuance so that he could secure an independent appraisal of the value of the items, but the district court overruled his motion.

Connor was convicted of theft by unlawful taking involving property worth more than $500 but less than $1,500 in violation of Neb. Rev. Stat. § 28-511(1) (Reissue 1995), a Class IV felony under Neb. Rev. Stat. § 28-518(2) (Reissue 1995). He was sentenced to 1 to 3 years' imprisonment. Connor timely appealed.

ASSIGNMENTS OF ERROR

Connor assigns the following errors to the district court: (1) using the wrong measure of value to prove the value of the items at the time of the alleged theft, (2) not granting him a continuance to allow for the items to be examined by an appraiser, and (3) imposing an excessive sentence.

STANDARD OF REVIEW

Sufficiency of Evidence.

[1,2] In reviewing a criminal conviction, an appellate court does not resolve conflicts in the evidence, pass on the credibility of witnesses, or reweigh the evidence. Such matters are for the finder of fact, and a conviction will be affirmed, in the absence of prejudicial error, if the properly admitted evidence, viewed and construed most favorably to the State, is sufficient to support the conviction. *State v. Aldaco*, 271 Neb. 160, 710 N.W.2d 101 (2006). When reviewing a criminal conviction for sufficiency of the evidence to sustain the conviction, the relevant question for an appellate court is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *Id.*

Motion for Continuance.

[3] A motion for continuance is addressed to the discretion of the trial court and will not be disturbed on appeal absent a

showing of an abuse of discretion. *State v. Santos*, 238 Neb. 25, 468 N.W.2d 613 (1991).

Excessive Sentence.

[4,5] Whether an appellate court is reviewing a sentence for its leniency or its excessiveness, a sentence imposed by a district court that is within the statutorily prescribed limits will not be disturbed on appeal unless there appears to be an abuse of the trial court's discretion. *State v. Hamik*, 262 Neb. 761, 635 N.W.2d 123 (2001). A judicial abuse of discretion exists only when the reasons or rulings of a trial judge are clearly untenable, unfairly depriving a litigant of a substantial right and denying a just result in matters submitted for disposition. *Id.*

ANALYSIS

Whether State Presented Evidence Beyond Reasonable Doubt of Value of Items.

Connor argues the State did not present sufficient evidence such that the jury could have determined the value of the stolen items beyond a reasonable doubt. The State's evidence of the value of the stolen items came through the store's front-end manager, Schwinn. Schwinn identified the items found in Connor's car, provided the police with a printout of the price of the items, and testified to the retail sale price of each unpaid item at Connor's trial.

[6-9] Connor relies on *State v. Garza*, 241 Neb. 256, 487 N.W.2d 551 (1992), in which the Supreme Court stated that price tags on items were not sufficient to establish the value of those items. The State must prove, beyond a reasonable doubt, the value of the property that is the subject of the theft charge. See *id*. Value to be proved concerning a theft is market value at the time and place where the property was criminally appropriated. There is no better way of showing the market value of any article than the price at which it and others of its class are being offered and sold on the market. *Id.* In reference to the crime of theft, value is established by evidence concerning the price at which property identical or reasonably similar to the property stolen is offered for sale and sold in proximity to the site of the theft. *Id.*

Here, although Schwinn testified to the "retail value" of the items, it is clear from our review of the evidence that this figure provided by Schwinn is simply the sum of the various amounts she said were the "retail sales prices" of the items. Thus, Schwinn's total figure of $1,477.16 for retail value, using the rubric of *Garza*, was merely the sum of the "price tags" to arrive at "retail value" of the stolen items. *Garza* makes it clear that the amount an item is priced for sale does not equate to market value and that the State's burden is to prove market value.

[10] After *Garza* was decided, the court decided *State v. Gartner*, 263 Neb. 153, 638 N.W.2d 849 (2002), which also held that proof of price at which a stolen item was offered for sale *and sold* in proximity to the site of the theft is evidence of market value. However, the court in *Gartner* also said:

> Evidence of the purchase price of the goods, however, is competent evidence of fair market value only where the goods are so new, and thus, have depreciated in value so insubstantially as to allow a reasonable inference that the purchase price is comparable to the fair market value.

263 Neb. at 165, 638 N.W.2d at 860.

In the present case, the State's evidence of value was simply the "price tags"—disapproved in *Garza, supra*, when such is the sole evidence of value. The State failed to ask whether items like those taken by Connor had been recently sold at the prices that Schwinn said they were offered for retail sale on September 22, 2006, the day of the theft. As a result, we are forced by the clear precedent laid down in *Garza, supra*, and *Gartner, supra*, to find that the evidence was insufficient to support the jury's finding that the value of the stolen goods was $1,283.23. Consequently, there was insufficient evidence for the jury to find beyond a reasonable doubt that the items Connor stole from the store were worth $500 to $1,500. We reverse the district court's order in this regard.

Whether District Court Erred in Failing to Sustain Connor's Motion for Continuance.

[11] Connor argues that the district court erred when it overruled his motion for a continuance, which he requested so that

he could obtain an independent appraisal of the items' values. However, the State filed charges against Connor on November 1, 2006, and the trial was held on September 12, 2007, which means that Connor had more than 9 months to obtain an appraisal of the items. "'"Where due diligence by the moving party has not been shown, the ruling of the trial court overruling a motion for a continuance for the purpose of securing additional evidence will not be disturbed."'" *State v. Broomhall*, 221 Neb. 27, 31, 374 N.W.2d 845, 847-48 (1985). Connor did not show due diligence by waiting until his trial had already commenced to claim that he needed to obtain an independent appraisal of the items' values, given that he had more than 9 months to obtain an appraisal—if he really wanted such. The district court did not abuse its discretion in overruling Connor's motion for a continuance.

Whether District Court Imposed Excessive Sentence.

Connor was convicted of a Class IV felony and sentenced to 1 to 3 years' imprisonment. However, because we have found that the jury could not have found beyond a reasonable doubt that the items Connor stole were worth more than $500 but less than $1,500, we cannot affirm Connor's conviction of a Class IV felony or the corresponding prison sentence. See *State v. Garza*, 241 Neb. 256, 487 N.W.2d 551 (1992). However, the *Garza* court found that the evidence showed beyond a reasonable doubt that the property stolen had some intrinsic value that translates into nominal market value, notwithstanding the absence of evidence establishing a specific value for the stolen property. Therefore, the *Garza* court set aside the felony sentence imposed and remanded the matter to the district court with direction to impose an appropriate sentence for misdemeanor theft of property with a value less than $100, a Class II misdemeanor under § 28-518(4), now $200 or less.

We reach the same result here, and therefore, we set aside Connor's felony conviction and remand this matter to the district court with direction to impose an appropriate sentence on Connor for misdemeanor theft of property with a value less than $200, a Class II misdemeanor. See, § 28-518(4); *Garza, supra.*

CONCLUSION

For the foregoing reasons we affirm in part and reverse in part the judgment of the district court, and we remand the cause with directions.

AFFIRMED IN PART, AND IN PART REVERSED AND REMANDED WITH DIRECTIONS.

STATE OF NEBRASKA, APPELLEE. V.
ALLEN J. WILSON, ALSO KNOWN AS
ALFRED J. WILLIAMS, APPELLANT.
754 N.W.2d 780

Filed August 5, 2008. No. A-07-626.

1. **Rules of Evidence.** In proceedings where the Nebraska Evidence Rules apply, the admissibility of evidence is controlled by the Nebraska Evidence Rules; judicial discretion is involved only when the rules make discretion a factor in determining admissibility.
2. **Witnesses: Hearsay.** A witness' pretrial statement identifying a defendant as the perpetrator of a crime is hearsay and, therefore, is inadmissible.
3. **Witnesses: Prior Statements: Evidence.** Prior inconsistent statements are admitted solely for the purpose of discrediting the reliability of a witness; they are not admissible as substantive evidence of the facts stated.
4. **Testimony: Impeachment: Appeal and Error.** In determining whether subsequent evidence or testimony constitutes impeachment, a trial judge has the discretion to determine whether the testimony is inconsistent, and, absent an abuse of that discretion, the ruling will be upheld on appeal.
5. **Judgments: Speedy Trial: Appeal and Error.** Ordinarily, a trial court's determination as to whether charges should be dismissed on speedy trial grounds is a factual question which will be affirmed on appeal unless clearly erroneous.
6. **Constitutional Law: Speedy Trial.** Determining whether a defendant's constitutional right to a speedy trial has been violated requires a balancing test in which the court must approach each case on an ad hoc basis and balance the following four factors: (1) the length of the delay, (2) the reason for the delay, (3) the defendant's assertion of the right, and (4) prejudice to the defendant.
7. **Speedy Trial.** There is some responsibility upon a defendant to assert his right to a speedy trial, but this is not to say that a defendant has a duty to bring himself to trial or to demand a trial.
8. ____. Prejudice should be looked at with particularity and should be assessed in the light of the three interests of defendants which the speedy trial right was designed to protect: (1) to prevent oppressive pretrial incarceration, (2) to minimize anxiety

and concern of the accused, and (3) to limit the possibility that the defense will be impaired.

9. **Sentences: Appeal and Error.** Sentences within statutory limits will be disturbed by an appellate court only if the sentences complained of were an abuse of judicial discretion.
10. **Appeal and Error.** An appellate court always reserves the right to note plain error which was not complained of at trial or on appeal.
11. **Sentences: Weapons.** Although it is generally within the trial court's discretion to direct that sentences imposed for separate crimes be served concurrently or consecutively, Neb. Rev. Stat. § 28-1205(3) (Reissue 1995) does not permit such discretion in sentencing, because it mandates that a sentence for the use of a deadly weapon in the commission of a felony be served consecutively to any other sentence imposed.
12. **Sentences: Appeal and Error.** An appellate court has the power on direct appeal to remand a cause for the imposition of a lawful sentence where an erroneous one has been pronounced.

Appeal from the District Court for Douglas County: SANDRA L. DOUGHERTY, Judge. Affirmed in part, and in part vacated and remanded with directions for resentencing.

Michael J. Decker, of Decker Law Offices, for appellant.

Jon Bruning, Attorney General, Erin E. Leuenberger, and James D. Smith for appellee.

INBODY, Chief Judge, and IRWIN and CARLSON, Judges.

IRWIN, Judge.

I. INTRODUCTION

Allen J. Wilson, also known as Alfred J. Williams, appeals his six felony convictions and sentences. Wilson challenges, among other things, the trial court's denying the admissibility of evidence regarding two eyewitness' prior out-of-court identifications of a person other than Wilson as the perpetrator.

The evidence at issue consists of out-of-court statements made by the victims and the lead detective on the case, Det. Terry Iselin. The statements of these three witnesses would have addressed the question of whether the victims had previously identified someone other than Wilson during a photographic lineup conducted by Iselin. Wilson argues that testimony regarding the prior out-of-court identifications constituted evidence of prior inconsistent statements and that, as such, the testimony

should have been admissible for impeachment purposes. We find that the statements were hearsay and that the foundation laid or omitted during trial did not qualify such statements as prior inconsistent statements; therefore, the statements could not be used for impeachment purposes.

II. BACKGROUND

Wilson's convictions and sentences stem from a "home invasion" robbery which occurred on February 3, 1998. On that day, two armed men forced their way into Thomas Johnson's residence. At the time, he resided with his girlfriend, Tanyel Smith, and their two young daughters. The two men bound Johnson and Smith with duct tape in the living room of the residence. While Johnson and Smith were bound, the men poured lighter fluid on them and threatened to put them in the bathtub and light them on fire if the couple did not tell the men where "the money" was or if anyone called the police.

While Johnson and Smith were bound in the living room, the couple's two daughters were in a nearby bedroom. One of the perpetrators pointed his gun at the young girls and told them not to leave the room or try to call for help. The perpetrators ultimately left the residence after taking $5,000 cash and Smith's car.

After the perpetrators left, Smith called the police. When the police arrived, Smith informed them that she had recognized one of the men to be James Williams. The police later arrested James Williams and interviewed him on February 3, 1999. During the interview, he identified his accomplice as his uncle whom he knew as "Alfred Williams." He then gave police a physical description of his uncle.

Police subsequently contacted the Department of Correctional Services and located a photograph of a person who matched the description of "Alfred Williams." The Department of Correctional Services identified the person in the photograph as "Allen J. Wilson." Police showed the photograph of Wilson to James Williams. James Williams stated that the photograph depicted his uncle, "Alfred Williams," who had assisted him in the 1998 robbery.

Based on the above information, the county court issued a warrant for Wilson's arrest, and the State filed four one-count complaints based on the above-described acts. The complaints, dated February 12, 1999, charged Wilson with two counts of robbery and two counts of use of a deadly weapon to commit a felony.

On June 9, 2005, Wilson made his first appearance in county court on the charges. On July 15, the county court held a preliminary hearing, and the matter was bound over to the district court. On July 19, the State filed an information charging Wilson with two counts of robbery and two counts of use of a deadly weapon to commit a felony, all counts arising out of acts committed on February 3, 1998. Pursuant to amendments to the information, filed on August 3 and December 30, 2005, two counts of false imprisonment in the first degree were added to Wilson's charges. In addition, the State alleged that Wilson was a habitual criminal.

On January 20, 2006, Wilson filed a motion for discharge. The motion alleged that the failure to prosecute the matter within 6 months of filing the original action in the county court and within 6 months of the filing of the information denied him his statutory right to a speedy trial and that the failure to prosecute the matter for 7 years denied him his federal and state constitutional rights to a speedy trial.

During the hearing on Wilson's motion for discharge, his counsel conceded that the statutory speedy trial time had not run based on the time the information was filed in district court. With respect to the constitutional speedy trial right, Wilson's counsel argued that Wilson's defense would suffer prejudice by the delay, because "if and when alibi witnesses are called, we believe the State is going to attack the witnesses's credibility based on the length of time it's been since the incident occurred and remembering back as far as when [Wilson] was in California, et cetera." The State asserted that law enforcement officers performed a diligent search for Wilson, that the warrant for his arrest remained active until Wilson was arrested in the Douglas County area, and that the time for a speedy trial did not begin to run until the information was filed on July 19, 2005.

In an order filed January 25, 2006, the court overruled Wilson's motion for discharge. The court ruled that the statutory speedy trial right had not been violated and that Wilson had not been prejudiced by the delay.

On January 30, 2006, trial commenced on the matter. At trial, the key issue in contention was whether or not Wilson was, in fact, the second perpetrator of the home invasion. Wilson defended the charges by asserting that he had been in California on February 3, 1998, when the robbery was committed.

The only evidence the State presented regarding whether or not Wilson was the second perpetrator of the robbery was the testimony of the two adult victims, Johnson and Smith. Both Johnson and Smith testified that during the robbery, they had the opportunity to look at the second perpetrator. Smith testified that she looked at the man "long enough to make him mad." She testified that the man told her to get down and stop looking at him. During their trial testimony, both Johnson and Smith identified Wilson as the second perpetrator and both testified that there was no doubt in their minds that Wilson was the person who robbed them.

After Johnson and Smith identified Wilson as the perpetrator, Wilson's counsel attempted to elicit testimony from each of them about whether or not they had ever identified someone else as the second perpetrator. The State objected to this line of questioning, and the trial court ruled that evidence of Johnson's and Smith's prior out-of-court identifications was inadmissible. The specific circumstances and facts surrounding the trial court's rulings will be discussed in detail below.

At the conclusion of the evidence, the jury found Wilson guilty of two counts of robbery, two counts of use of a deadly weapon to commit a felony, and two counts of false imprisonment in the first degree. After the verdicts were rendered, the trial court held a hearing and determined that Wilson was a habitual criminal. The court then sentenced Wilson to a term of imprisonment of 10 to 20 years for each count of robbery and each count of use of a deadly weapon to commit a felony and a term of imprisonment of 10 to 10 years for each count of false imprisonment. Wilson appeals his convictions and sentences here.

III. ASSIGNMENTS OF ERROR

On appeal, Wilson assigns and argues four errors. First, Wilson asserts that the trial court erred in rulings regarding the admissibility of evidence of Johnson's and Smith's prior out-of-court identifications of a different person as the perpetrator. Second, Wilson asserts that the trial court erred in not permitting extrinsic evidence of a prior inconsistent statement of Smith from a previous hearing. Third, Wilson asserts that the trial court erred in denying his motion to discharge and in finding that his constitutional right to a speedy trial was not violated. Fourth, Wilson asserts that the sentences imposed by the court were excessive.

Wilson also assigns as error the admission of hearsay testimony over his objection. However, Wilson does not specifically argue this assignment of error in his brief. To be considered by an appellate court, an alleged error must be both specifically assigned and specifically argued in the brief of the party asserting the error. *Olivotto v. DeMarco Bros. Co.*, 273 Neb. 672, 732 N.W.2d 354 (2007). We therefore will not consider this additional assignment of error.

IV. ANALYSIS

1. Admissibility of Prior Identification Testimony

Wilson asserts that the trial court erred in finding certain evidence to be inadmissible hearsay. The evidence at issue consists of out-of-court statements made by the victims, Johnson and Smith, and the lead detective on the case, Iselin. The inadmissible statements of these three witnesses would have addressed the question of whether Johnson and Smith had previously identified someone other than Wilson as the second perpetrator during a photographic lineup conducted by Iselin. In his brief, Wilson argues that testimony regarding the prior out-of-court identifications constituted evidence of prior inconsistent statements and that, as such, the testimony should have been admissible for impeachment purposes. In light of the foundation laid or omitted during trial to qualify such statements as prior inconsistent statements, we find that the trial court did not abuse its discretion in ruling that the statements were inadmissible.

(a) Are Out-of-Court Identifications Hearsay?

[1] In proceedings where the Nebraska Evidence Rules apply, the admissibility of evidence is controlled by the Nebraska Evidence Rules; judicial discretion is involved only when the rules make discretion a factor in determining admissibility. *State v. Kuehn*, 273 Neb. 219, 728 N.W.2d 589 (2007).

While the Nebraska Evidence Rules have several counterparts in the Federal Rules of Evidence, or are otherwise patterned on the federal rules, the Nebraska Evidence Rules and the Federal Rules of Evidence differ in their treatment of evidence regarding an out-of-court identification. Under the federal rules, statements regarding an out-of-court identification are considered nonhearsay. Fed. R. Evid. 801(d) provides: "Statements which are not hearsay.— A statement is not hearsay if— (1) Prior statement by witness.— The declarant testifies at the trial or hearing and is subject to cross-examination concerning the statement, and the statement is . . . (C) one of identification of a person made after perceiving the person . . . ."

[2] To the contrary, Neb. Evid. R. 801(4)(a) does not contain such classification and provision and, in fact, makes no mention whatsoever concerning witness identification as a nonhearsay statement. In addition, none of the other Nebraska rules of evidence or other Nebraska statutes authorize admissibility of a witness' pretrial identification of a defendant as a nonhearsay statement or statement otherwise exempted or excluded from the operation and purview of the "hearsay rule," Neb. Evid. R. 802, prohibiting admission of hearsay. See *State v. Salamon*, 241 Neb. 878, 491 N.W.2d 690 (1992). Accordingly, in the absence of admissibility authorized under the Nebraska Evidence Rules or by other statute, a witness' pretrial statement identifying a defendant as the perpetrator of a crime is hearsay pursuant to rule 801(3) and, therefore, is inadmissible as the result of rule 802. *State v. Salamon, supra.*

It is clear, then, that any testimony regarding Johnson's and Smith's out-of-court identifications of someone other than Wilson as the perpetrator of the robbery constituted inadmissible hearsay. However, classifying the testimony as inadmissible hearsay does not end our inquiry. While testimony regarding the out-of-court identifications is not admissible

as substantive evidence, the testimony may be admissible as impeachment evidence.

(b) Use of Hearsay Statement as Prior Inconsistent Statement

[3] One way to impeach a witness' credibility is to show that the witness previously made a statement contradictory to what he or she testified to at trial. Prior inconsistent statements of a witness are admissible as impeachment evidence. *State v. Rodriguez*, 272 Neb. 930, 726 N.W.2d 157 (2007). However, such prior inconsistent statements are admitted solely for the purpose of discrediting the reliability of the witness. They are not admissible as substantive evidence of the facts stated. See *State v. Isley*, 195 Neb. 539, 239 N.W.2d 262 (1976).

At trial, Wilson's counsel argued that the testimony regarding Johnson's and Smith's out-of-court identifications was admissible as a prior inconsistent statement because both parties had identified Wilson in court as the perpetrator of the robbery. We now analyze whether testimony about Johnson's and Smith's out-of-court identifications amounted to evidence of prior inconsistent statements which would be admissible as impeachment evidence. In conducting our analysis of this question, we first summarize the foundation offered to demonstrate that Johnson's and Smith's out-of-court identifications were inconsistent with their in-court identifications of Wilson as the perpetrator.

(i) Foundational Questioning About Johnson's Out-of-Court Identification

During his cross-examination of Johnson, Wilson's counsel asked Johnson about the photographic lineup conducted by police after the robbery. Wilson's counsel asked: "And when you looked at those photos, you identified someone as being the person that robbed you; is that correct?"; "Sir, were you asked by the detective whether or not the — anyone in the photo array in this photo spread resembled the person that robbed you; is that correct?"; and "Did you identify someone in the photo array?" Before Johnson could respond to any of the above questions, the State objected on hearsay grounds and the court sustained the objection.

(ii) Foundational Questioning About Smith's Out-of-Court Identification

When cross-examining Smith, Wilson's counsel asked Smith whether the police had shown her a photographic lineup relating to the second perpetrator of the robbery. Smith testified that she did not remember being shown such a lineup. Wilson's counsel did not pursue the line of questioning any further with her.

(iii) Foundational Questioning About Iselin's Out-of-Court Statement

During his case in chief, Wilson called Iselin to testify. Iselin was the lead detective for the investigation of the robbery and, as a part of his investigation, had shown Johnson and Smith a photographic lineup to help them identify the second perpetrator of the robbery. Defense counsel questioned Iselin as follows:

> Q. And in this second photo array, was the photo of Mr. Williams present in that photo array?
>
> A. No.
>
> Q. Okay. All the individuals in that photo array were someone other than Mr. Williams — or Mr. Alfred Williams, correct, the one you put together?
>
> A. Yes.
>
> Q. And Mr. James Williams was not — his photograph was not in that photo array, correct?
>
> A. Correct.

After questioning Iselin regarding whether "Williams" appeared in the photographic array, Wilson's counsel attempted to question him regarding Johnson's and Smith's prior out-of-court identifications of someone other than Wilson as the second perpetrator of the robbery. The State objected to the questions regarding the prior identification on hearsay grounds, and the court sustained the objections.

(c) Analysis of Counsel's Questions of Johnson to Determine Admissibility as Prior Inconsistent Statement

We now turn to our analysis of whether counsel's foundational questions regarding Johnson's prior out-of-court identification established inconsistency between Johnson's out-of-court identification statements and in-court identification of

Wilson as the second perpetrator. During his cross-examination of Johnson, Wilson's counsel first asked Johnson: "And when you looked at those photos, you identified someone as being the person that robbed you; is that correct?" Based on our discussion above, the response to this question would clearly be hearsay because it would be a witness' out-of-court statement identifying a person as the perpetrator of a crime. However, Wilson does not contest the trial court's determination that the answer to this question would be inadmissible hearsay. Rather, he asserts that the answer to the question would be admissible as a prior inconsistent statement of Johnson's in-court identification of Wilson as the perpetrator.

[4] We do not find that the answer to counsel's question would necessarily be inconsistent with Johnson's in-court identification of Wilson. In determining whether subsequent evidence or testimony constitutes impeachment, a trial judge has the discretion to determine whether the testimony is inconsistent, and, absent an abuse of that discretion, the ruling will be upheld on appeal. *First Nat. Bank in Mitchell v. Kurtz*, 232 Neb. 254, 440 N.W.2d 432 (1989). See, also, *State v. Marco*, 220 Neb. 96, 368 N.W.2d 470 (1985). Upon our review of the record, we cannot say that the court abused its discretion in prohibiting Johnson from responding to counsel's question about whether he identified "someone" in the lineup. We do not find sufficient evidence regarding who appeared in the lineup, the physical features of those individuals appearing in the lineup, or the circumstances surrounding the lineup to demonstrate that Johnson's response to such a question would be inherently inconsistent with his prior testimony identifying Wilson as the second perpetrator.

First, we note that while there is some evidence that Wilson did not appear in the photographic lineup, this evidence is unclear. Counsel asked Iselin about the persons depicted in the photographic array. Counsel first asked, "And in this second photo array, was the photo of Mr. Williams present in that photo array?" Iselin testified that "Williams" did not appear in the lineup. It is not clear from this question whether counsel is referring to James Williams, Wilson's nephew and alleged accomplice, or to Alfred Williams, which is an alias of Wilson's.

Accordingly, this question does not sufficiently demonstrate that Wilson did not appear in the lineup and that, consequently, if Johnson identified "someone," the identification would have to have been of someone other than Wilson.

Counsel next asked Iselin, "Okay. All the individuals in that photo array were someone other than Mr. Williams — or Mr. Alfred Williams, correct, the one you put together?" Iselin responded, "Yes." While counsel appears to be attempting to ask Iselin whether Alfred Williams appeared in the lineup, the question is confusing. Within the question, counsel first asks if all of the individuals in the photographs were people other than "Mr. Williams." Again, we do not know whether counsel is referring to James Williams or Alfred Williams. Counsel then changes the question to refer to "Mr. Alfred Williams." While the name Alfred Williams refers to the defendant, it is unclear whether the jury would have understood this reference. Wilson was introduced to the jury as both Allen Wilson and Alfred Williams; he was referred to by both names during the trial. The jury also received information about James Williams, Wilson's nephew. Given this confusion regarding Wilson's name and regarding the differentiation between Wilson and James Williams, we do not find that counsel's questions to Iselin clearly and unequivocally established that Wilson was not present in the photographic lineup.

Furthermore, we note that there is no evidence regarding the physical features of persons appearing in the lineup or regarding Wilson's physical features. Without such evidence, it is difficult to make an assessment about the actual inconsistency between Johnson's out-of-court identification of "someone" and his in-court identification of Wilson.

Finally, there is evidence that Iselin struggled to remember specific details about the circumstances surrounding the lineup. In fact, the record indicates that he could testify only to the information included in his police report regarding the robbery. From the record, it appears that he had little independent recollection of the photographic lineup, itself, or of Johnson's identification. This would be consistent with the fact that the events he was testifying about occurred approximately 8 years prior to trial.

Because there is insufficient evidence to establish who was pictured in the lineup, the physical features of the persons in the lineup, and the precise circumstances surrounding the lineup, we cannot say that the trial court abused its discretion in determining that Johnson's answer to this question would not necessarily provide any information inconsistent with his previous testimony that Wilson was the second perpetrator. Accordingly, we find that the court did not err in sustaining the State's objection to this question.

Counsel next asked Johnson: "Sir, were you asked by the detective whether or not the — anyone in the photo array in this photo spread resembled the person that robbed you; is that correct?" Again, the response to this question would be hearsay. In order to answer the question, Johnson would have to provide testimony of an out-of-court statement made by the detective. Moreover, the answer to this question would not be inconsistent with any of Johnson's previous testimony, because the question only asks if Johnson was asked whether or not a person in the photographic spread resembled the person that robbed him. The question would not elicit any testimony which would suggest that Johnson previously identified someone other than Wilson as the perpetrator. Accordingly, we find that the court did not err in sustaining the State's objection to this question.

Finally, counsel asked Johnson: "Did you identify someone in the photo array?" This question is very similar to the first question asked of Johnson on this topic. The response to the question would elicit hearsay testimony and would not necessarily provide any inconsistencies with Johnson's prior testimony. As we discussed more thoroughly above, because there is insufficient evidence regarding the individuals pictured in the lineup and regarding the circumstances surrounding Johnson's viewing of the lineup, whether Johnson identified "someone" in the lineup does not directly contradict his prior in-court identification of Wilson as the second perpetrator. If counsel had asked Johnson whether he had identified someone other than Wilson in the photographic lineup or whether he had ever identified someone other than Wilson as the second perpetrator, then Johnson's answers would be admissible as prior inconsistent statements. Such types of questions were not asked.

Based on our review of counsel's questioning of Johnson regarding the prior out-of-court identification, we find that the court did not err in sustaining the State's objections to this line of questioning or in prohibiting Johnson from answering the questions. Counsel's questions would have elicited inadmissible hearsay testimony and would not necessarily have elicited any inconsistency between Johnson's in-court testimony and any out-of-court identification. As such, the court did not abuse its discretion in determining that the responses to the questions were not admissible as evidence of a prior inconsistent statement.

After the court sustained the State's objections to this line of questioning, Wilson's counsel made an offer of proof regarding Johnson's prior out-of-court identification as follows:

> Q. Sir, you were shown a photo spread by Detective Iselin; is that correct?
>
> A. Yes.
>
> Q. And you — after reviewing that photo spread, you identified a party in a certain position; is that correct?
>
> A. No, I didn't.
>
> Q. You did not?
>
> A. No.
>
> Q. Did you say that that's him?
>
> A. No, I didn't.
>
> Q. Okay. And so if Detective Iselin's report indicated otherwise, that would be incorrect?
>
> A. Yes.

We first note that counsel asked different questions of Johnson during the offer of proof than he did during his cross-examination of Johnson. We also note that the first question in the offer of proof would have been admissible if offered at the trial because it did not elicit any hearsay testimony. The other testimony in the offer of proof demonstrates only that, while Johnson remembers viewing a photographic lineup, he does not believe that he identified any particular person in the photographs as being the perpetrator of the robbery. The offer of proof contains no information inconsistent with the testimony that Johnson gave in court. In fact, the questions that Wilson's

counsel asked during the offer of proof could not have elicited inconsistency with Johnson's prior testimony. As discussed above, whether or not Johnson identified "a party" from a photographic lineup is not inherently inconsistent with his trial testimony that Wilson was the perpetrator of the robbery. Because there was no inconsistency between Johnson's trial testimony and his testimony presented in the offer of proof, the trial court did not err in excluding from evidence Johnson's testimony about the photographic lineup.

(d) Analysis of Counsel's Questions of Smith to Determine Admissibility as Prior Inconsistent Statement

We next analyze whether counsel's foundational questions regarding Smith's out-of-court identification statements established any inconsistency between the out-of-court identification and the in-court identification of Wilson as the second perpetrator of the robbery. As we discussed above, counsel asked Smith only whether the police had shown her a photographic lineup relating to the second perpetrator of the robbery. Smith testified that she did not remember being shown such a lineup, and counsel did not question her any further about this issue.

Because counsel did not ask Smith any further questions about the lineup after she stated that she did not remember being shown such a lineup, he did not elicit any information which would be inconsistent with Smith's previous testimony identifying Wilson as the second perpetrator. Additionally, we note that in his brief, Wilson generally asserts that the district court erred in finding evidence of Johnson's and Smith's out-of-court identification statements to be inadmissible; however, his brief focuses primarily on Johnson's out-of-court statements. As such, we find that Wilson's assertions regarding evidence of Smith's out-of-court identification have no merit.

(e) Analysis of Counsel's Questions of Iselin to Determine Admissibility as Prior Inconsistent Statement

Wilson also argues that Iselin's testimony about Johnson's and Smith's out-of-court identifications of someone other than Wilson as the perpetrator should have been admitted as impeachment evidence. We disagree.

(i) Iselin's Testimony About Johnson's Out-of-Court Identifications

Wilson's counsel presented an offer of proof regarding Iselin's testimony about Johnson's out-of-court identification. The offer of proof reveals that Iselin would have testified that, when shown a photographic lineup, Johnson identified someone named "Daniel Mitchell" as the second perpetrator of the robbery.

In his brief, Wilson is unclear about why Iselin's testimony should be considered a prior inconsistent statement. However, we consider two arguments which Wilson appears to argue in his brief. First, we examine whether Iselin's testimony about Johnson's out-of-court statements would be evidence of a prior inconsistent statement when viewed in light of Johnson's offer of proof testimony. We next examine whether Iselin's testimony would be evidence of a prior inconsistent statement when viewed in light of Johnson's in-court identification of Wilson as a perpetrator of the robbery.

a. Possible Inconsistency With Johnson's Offer of Proof Testimony

To the extent that Wilson asserts that Iselin's testimony is a prior inconsistent statement offered to impeach Johnson's offer of proof testimony, his contention is without merit. While Iselin's statements that Johnson did, in fact, identify someone from the photographic lineup are directly contradictory to Johnson's statements that he did not identify any particular person from the lineup as the perpetrator, Johnson's statements were correctly ruled inadmissible and were not put in evidence for the jury to consider.

As we discussed more fully above, Johnson's answers to the questions in the offer of proof did not produce any inconsistency with his prior trial testimony identifying Wilson as the perpetrator of the robbery. Accordingly, the testimony in the offer of proof was not admissible as evidence of a prior inconsistent statement. Because the offer of proof testimony was not admissible, Iselin's testimony cannot be admissible as evidence of an inconsistency between the offer of proof testimony and Johnson's prior out-of-court identification statements.

b. Possible Inconsistency With Johnson's In-Court Identification of Wilson

To the extent Wilson asserts that Iselin's testimony is a prior inconsistent statement offered to impeach Johnson's in-court identification of Wilson, his contention is, again, without merit.

As we discussed above, counsel's questioning of Johnson regarding the prior out-of-court identification was problematic. Counsel did not sufficiently develop Johnson's testimony regarding whether or not he had ever previously identified anyone other than Wilson as the second perpetrator of the robbery. As a result, counsel was not able to elicit any testimony regarding the circumstances or particulars of the photographic lineup in question. We also note that there is no evidence from any source regarding Wilson's physical characteristics or the physical characteristics of the individuals appearing in the photographic lineup. Based on these circumstances, we cannot say that Iselin's testimony that Johnson previously identified someone else as either looking like or being the perpetrator of the robbery is necessarily inconsistent with Johnson's in-court identification of Wilson. As such, we conclude that the trial court did not abuse its discretion in ruling that Iselin's testimony regarding the out-of-court identification was inadmissible.

(ii) Iselin's Testimony About Smith's Out-of-Court Identifications

As stated in Iselin's offer of proof testimony, Smith also identified a man named "Daniel Mitchell" as the second perpetrator of the robbery. While she was initially not positive about this identification, after discovering that Johnson also picked Mitchell out of the lineup, she did eventually state that she was fairly certain that Mitchell was one of the robbers.

Again, Wilson is not clear about why Iselin's offer of proof testimony regarding Smith's out-of-court identification of Mitchell is admissible as a prior inconsistent statement. For the sake of our analysis, we assume that Wilson is asserting that Iselin's offer of proof testimony would be evidence of an inconsistency between Smith's testimony at trial stating that she did not remember participating in the lineup or her testimony identifying Wilson as the perpetrator and her out-of-court identification.

a. Possible Inconsistency With Smith's Memory of Photographic Lineup

During counsel's cross-examination of Smith, she testified that she did not remember participating in a lineup to identify the second perpetrator. While Iselin testified that Smith did, in fact, participate in a lineup to identify the second perpetrator of the robbery, this testimony is not necessarily directly inconsistent with Smith's testimony that she did not remember such a lineup. We first note that counsel did not attempt to refresh Smith's memory of the lineup, nor did he question her further on the topic of a prior out-of-court identification. In light of the fact that the robbery occurred approximately 8 years prior to the time of the trial, we cannot say that the court abused its discretion in ruling that Iselin's testimony that Smith did participate in the lineup was inadmissible.

b. Possible Inconsistency With Smith's In-Court Identification of Wilson

To the extent Wilson asserts that Iselin's testimony that Smith identified Mitchell as the robber is inconsistent with her in-court identification of Wilson, we find the assertion to be without merit. As we discussed above in relation to Iselin's offer of proof testimony about Johnson's out-of-court identification, there was no evidence regarding the circumstances or particulars of the photographic lineup in question. There is no evidence regarding Wilson's physical characteristics or the physical characteristics of the individuals appearing in the photographic lineup. In addition, there is no clear and unequivocal evidence about whether or not Wilson even appeared in the photographic lineup. Based on these circumstances, we cannot say that Iselin's testimony that Smith previously identified someone else as either looking like or being the perpetrator of the robbery is necessarily inconsistent with her in-court identification of Wilson.

(f) Conclusion Regarding Admissibility of Prior Identification Testimony

We conclude that the trial court did not abuse its discretion in ruling that evidence of Johnson's and Smith's out-of-court identification statements was inadmissible. Such statements were

clearly hearsay and, based on counsel's foundational questioning of Johnson, Smith, and Iselin, the statements were not necessarily inconsistent with Johnson's and Smith's in-court identifications of Wilson as one of the robbers. This assertion is without merit.

2. Admissibility of Prior Inconsistent Statement From Preliminary Hearing

Wilson next asserts that the trial court erred in ruling that Smith's testimony from a preliminary hearing regarding whether or not the second perpetrator removed his sunglasses during the robbery was not admissible. Wilson asserts that such evidence was admissible because Smith's prior statements were given under oath and Smith was given an opportunity to explain the prior inconsistent statement. Upon our review of Wilson's proffered evidence about the inconsistent statement, we conclude that the court did not err in ruling the evidence to be inadmissible.

At trial, Smith testified that the second perpetrator of the robbery took off his sunglasses at some point during the incident and that she was able to get a good look at his face. On cross-examination, Wilson's counsel asked Smith whether she remembered testifying at a preliminary hearing. Smith responded that she did remember testifying at the hearing; however, after Wilson's counsel questioned her further, she stated that she did not remember the specific questions asked of her during the preliminary hearing, nor did she recall testifying that the robber kept his sunglasses on the entire time she saw him.

Before Wilson rested his case, his counsel attempted to offer into evidence a portion of Smith's testimony from a preliminary hearing regarding whether or not the perpetrator had his sunglasses on throughout the robbery. The State objected to the admission of the evidence, and the court sustained the objection.

We reproduce the first page of the proffered exhibit in its entirety here:

> Q- And black sun — he was wearing black sun glasses?
>
> A- Right.

Q- Were they tinted at all?

A- What — just — yes. He had the dark plastic sun glasses.

Q- You couldn't see through them. Correct?

. . . A- No, I couldn't see like (indiscernible).

This portion of the exhibit does not include any notation about who is asking the questions, who is answering the questions, or who was wearing the sunglasses. Additionally, there is no testimony referencing whether or not the second perpetrator wore the sunglasses throughout the robbery. As a result, this portion of the proffered exhibit cannot be considered inconsistent with Smith's trial testimony that the perpetrator took off his sunglasses at some point during the robbery.

The proffered exhibit contained a second page. We reproduce that page in its entirety here:

Officer Leland D. Cass - Direct

Q- And he didn't take them off. Right?

A- No.

We first note that it appears that this part of the exhibit is testimony by Officer Leland D. Cass, not by Smith. Furthermore, we note that the two lines reprinted on the page are provided without any further contextual information. We cannot discern who is being spoken about, nor can we discern what is being referred to in the question. As such, this portion of the proffered exhibit also cannot be considered a statement which is inconsistent with Smith's trial testimony. The exhibit indicates that this is not even Smith's preliminary hearing testimony, as Wilson's counsel asserted to the trial court.

Because the proffered exhibit does not demonstrate any inconsistency between Smith's trial testimony and her preliminary hearing testimony, the trial court did not err in ruling that the exhibit was inadmissible. We affirm the decision of the trial court.

3. Constitutional Right to Speedy Trial

Wilson next argues that the district court erred in overruling his motion to discharge and in finding that his constitutional right to speedy trial was not violated. Specifically, Wilson alleges that he was prejudiced by the 7-year delay between the

time the State filed the initial complaint in county court and the time of his trial in district court. In clarifying precisely how the delay prejudiced him, Wilson points out that the State attacked his alibi witness' credibility because of the length of time that had passed between the crime and the time of trial. In addition, Wilson argues the long delay resulted in the jurors' speculating that he had been a "fugitive from justice" and that his failure to appear and respond to the charges implied a "consciousness of guilt." Brief for appellant at 12.

Upon our review of the record, we find that there has been no violation of Wilson's constitutional right to a speedy trial under the federal or state Constitution. We affirm the decision of the district court overruling Wilson's motion to discharge.

Before we conduct an analysis of Wilson's allegations, we first note that Wilson appeals only from the trial court's finding that his constitutional right to a speedy trial was not violated. Wilson previously conceded that his statutory right to a speedy trial was not violated.

We also note that Wilson previously appealed to this court the trial court's finding regarding his constitutional right to a speedy trial. See *State v. Wilson*, 15 Neb. App. 212, 724 N.W.2d 99 (2006). Wilson filed his initial appeal after his trial, but before sentencing. We determined that we lacked jurisdiction to consider Wilson's appeal, because Wilson had not yet been sentenced and, thus, there was not a final, appealable order in the case. In concluding that we lacked jurisdiction, we noted that unlike the statutory right to a speedy trial, "the constitutional right to a speedy trial can be effectively vindicated in an appeal after judgment." *Id.* at 221, 724 N.W.2d at 107. Accordingly, we now analyze Wilson's claim that he was denied his constitutional right to a speedy trial.

[5,6] Ordinarily, a trial court's determination as to whether charges should be dismissed on speedy trial grounds is a factual question which will be affirmed on appeal unless clearly erroneous. *State v. Tucker*, 259 Neb. 225, 609 N.W.2d 306 (2000). The constitutional right to a speedy trial is guaranteed by U.S. Const. amend. IV and Neb. Const. art. I, § 11; the constitutional right to a speedy trial and the statutory implementation of that right exist independently of each other. *State*

v. Feldhacker, 267 Neb. 145, 672 N.W.2d 627 (2004); *State v. Robinson*, 12 Neb. App. 897, 687 N.W.2d 15 (2004). In determining whether a defendant's constitutional right to a speedy trial has been violated, the court applies a balancing test in which it approaches each case on an ad hoc basis. See *State v. Feldhacker, supra*. In *Barker v. Wingo*, 407 U.S. 514, 92 S. Ct. 2182, 33 L. Ed. 2d 101 (1972), the U.S. Supreme Court established the following four factors for a balancing test for determination of whether the constitutional right to a speedy trial has been violated: (1) the length of the delay, (2) the reason for the delay, (3) the defendant's assertion of the right, and (4) prejudice to the defendant. None of these four factors standing alone is a necessary or sufficient condition to the finding of a deprivation of the right to a speedy trial; rather, the factors are related and must be considered together with such other circumstances as may be relevant. *Id.* See, also, *State v. Feldhacker, supra*. We analyze each factor as it relates to the circumstances of this case.

(a) Length of Delay

The record in this case reveals that, although there was only an approximately 6-month delay from the time the State filed the information in district court on July 19, 2005, and the time Wilson filed his motion for discharge on January 20, 2006, there was a 7-year delay from the time the State filed its initial complaint in county court on February 12, 1999, and the time Wilson filed the motion to discharge. The Nebraska Supreme Court has previously held that it would consider unreasonable delays occurring in the prosecution of felony offenses prior to the return of an indictment or filing of an information in determining whether the defendant was denied the constitutional right to a speedy trial. See *State v. Born*, 190 Neb. 767, 212 N.W.2d 581 (1973).

When we consider the delay prior to the State's filing of the information in district court, we determine that the time between the filing of the initial complaint and the time of filing the information in district court was approximately 6½ years. This is certainly a lengthy delay. The length of the delay in this case favors Wilson.

(b) Reason for Delay

In reviewing the record, it is clear that the delay in this case generally stemmed from the State's inability to locate Wilson. The county court issued a warrant for Wilson's arrest on February 12, 1999, the same day that the State filed its complaint. However, Wilson's first appearance in county court on this matter was not until June 9, 2005.

At the hearing on Wilson's motion for discharge, the State informed the court that law enforcement officials had completed a "diligent search" for Wilson, but were unable to locate him. Specifically, the State informed the court as follows:

> [A]t the time the warrant was drafted, there was information given to [officers] by the second individual in this case that [Wilson] may have left for California. Officers at that time did check with the jurisdiction in California to no avail and did not locate [Wilson]. [Wilson] was then located on June 7th of 2005, actually, in the Omaha area, and was actually arrested on charges not related to this matter. And at that time, officers found the warrant from 1998 . . . .

Additionally, the State informed the court that the warrant for Wilson's arrest remained in effect until he was arrested in June 2005.

Wilson did not present any evidence to establish his whereabouts from the time the warrant for his arrest was issued in 1998 to the time he was arrested on an unrelated matter in 2005. Wilson also did not present any evidence to rebut the State's statements about its diligent efforts to locate him after the warrant was issued. Because Wilson did not rebut the State's evidence of diligent efforts, we find this factor favors the State.

(c) Assertion of Right

[7] There is some responsibility upon a defendant to assert his right to a speedy trial, but this is not to say that a defendant has a duty to bring himself to trial or to demand a trial. See, *Barker v. Wingo*, 407 U.S. 514, 92 S. Ct. 2182, 33 L. Ed. 2d 101 (1972); *State v. Schmader*, 13 Neb. App. 321, 691 N.W.2d 559 (2005). The only action which Wilson took that could be seen as an assertion of his right to a speedy trial was to file his motion

for discharge on January 20, 2006, 6 months after the State filed the initial information in district court and only 10 days prior to trial. See *Doggett v. United States*, 505 U.S. 647, 112 S. Ct. 2686, 120 L. Ed. 2d 520 (1992) (filing of motion to dismiss may be assertion of rights). In *Barker v. Wingo*, the Court stated: "We emphasize that failure to assert the right will make it difficult for a defendant to prove that he was denied a speedy trial." 407 U.S. at 532. Therefore, we find that this factor weighs in favor of the State.

(d) Prejudice to Defendant

[8] Prejudice should be looked at with particularity and should be assessed in the light of the three interests of defendants which the speedy trial right was designed to protect: (1) to prevent oppressive pretrial incarceration, (2) to minimize anxiety and concern of the accused, and (3) to limit the possibility that the defense will be impaired. See *Barker v. Wingo, supra*.

There is no evidence in the record to show that Wilson was incarcerated while awaiting trial. Even if there was evidence regarding Wilson's pretrial incarceration, the record indicates that Wilson was not arrested until June 2005 and that he filed his motion for discharge in January 2006. At most then, Wilson spent 6 months in jail prior to filing the motion for discharge. While we recognize both the societal and legal disadvantages of pretrial incarceration, we note that a pretrial incarceration period of 6 months, without further evidence of prejudice, is not inherently oppressive.

There is also no evidence in the record to demonstrate Wilson's level of anxiety or concern during the pendency of these proceedings. While there may be some degree of anxiety and concern in every criminal case, anxiety or concern by itself does not establish prejudice where the defendant neither asserts nor shows that the delay weighed particularly heavily on him in specific instances. *State v. Schmader, supra*.

There is evidence in the record which demonstrates that at least one of Wilson's witnesses struggled to remember specific details as a result of the time that had passed since the day of the robbery. Wilson called his mother to testify that he was in California with her on the day of the robbery. While

Wilson's mother did testify that Wilson was living with her in February 1998 when the robbery occurred, she admitted on cross-examination that she was only sure that Wilson lived with her in December 1997, January 1998, and part of February 1998. She testified that she was not sure what day Wilson left California in February 1998.

The record also reveals that many of the State's witnesses struggled to remember the details of the robbery and the resulting investigation by law enforcement officials. In *Barker v. Wingo*, 407 U.S. 514, 92 S. Ct. 2182, 33 L. Ed. 2d 101 (1972), the U.S. Supreme Court noted that just as the defense's case may suffer from a delay in the proceedings, the State's case is often plagued by problems caused by a delay. The Court stated: "As the time between the commission of the crime and trial lengthens, witnesses may become unavailable or their memories may fade. If the witnesses support the prosecution, its case will be weakened, sometimes seriously so. And it is the prosecution which carries the burden of proof." 407 U.S. at 521. While Wilson may have been prejudiced by his own witness' memory loss, he also benefited from the memory loss of the State's witnesses. As a result, the prejudice factor does not readily weigh in favor of the defendant or the State. However, given that Wilson's defense was, in fact, impaired to some degree by the delay, we determine that the prejudice factor weighs in his favor.

Wilson argues he was also prejudiced by the delay because the jury could have speculated that he was a "fugitive from justice" or that his failure to appear in court was a result of his "consciousness of guilt." There is no evidence in the record to support these assertions. Without any concrete evidence of the jurors' speculation regarding the delay, we do not consider these facts as a part of our balancing test.

(e) Resolution

As noted above, the factors for assessing the deprivation of an accused's constitutional speedy trial right must be considered on an ad hoc basis, together with other circumstances as may be relevant. After considering the factors in the present case, we conclude that the district court was not clearly erroneous in

finding that Wilson's constitutional speedy trial right was not violated. Although the delay was significant, the record before us does not indicate that there was any intentional act by the State to deprive Wilson of his right to a speedy trial. In fact, the record shows that Wilson was brought to trial approximately 6 months after he was finally located in June 2005. In addition, while there is evidence that Wilson's alibi witness had some trouble remembering the exact dates Wilson was present with her in California, there is also evidence that the State's witnesses suffered from memory problems as well. As such, we conclude that this assigned error is without merit, and the district court's order is affirmed.

4. Excessive Sentences

In his last assignment of error, Wilson asserts that the trial court abused its discretion by imposing excessive sentences. We disagree. We find that the sentences imposed by the district court were not excessive. However, we find plain error in the court's sentences to the extent that the court ordered the sentences for the false imprisonment convictions to run concurrently with the sentences for the use of a deadly weapon convictions. We therefore vacate those sentences and remand the cause to the district court with directions to resentence Wilson so that the sentences for the false imprisonment convictions run consecutively to the sentences for use of a deadly weapon.

[9] Sentences within statutory limits will be disturbed by an appellate court only if the sentences complained of were an abuse of judicial discretion. *State v. Walker*, 272 Neb. 725, 724 N.W.2d 552 (2006). An abuse of discretion occurs when a trial court's decision is based upon reasons that are untenable or unreasonable or if its action is clearly against justice or conscience, reason, and evidence. *Id.* When imposing a sentence, a sentencing judge should consider the defendant's (1) age, (2) mentality, (3) education and experience, (4) social and cultural background, (5) past criminal record or record of law-abiding conduct, and (6) motivation for the offense, as well as (7) the nature of the offense, and (8) the amount of violence involved in the commission of the crime. *State v. Thurman*, 273 Neb. 518, 730 N.W.2d 805 (2007).

Wilson was convicted of two counts of robbery, two counts of use of a deadly weapon to commit a felony, and two counts of false imprisonment in the first degree. Robbery and use of a deadly weapon to commit a felony are both Class II felonies punishable by a term of imprisonment of 1 to 50 years. False imprisonment in the first degree is a Class IIIA felony punishable by a term of imprisonment of up to 5 years.

After Wilson's trial, the district court determined that Wilson was a habitual criminal within the meaning of Neb. Rev. Stat. § 29-2221 (Cum. Supp. 2006). Because the court determined Wilson to be a habitual criminal, he was subject to a term of imprisonment of 10 to 60 years for each count of robbery, use of a deadly weapon to commit a felony, and false imprisonment in the first degree.

The district court sentenced Wilson to a term of imprisonment of 10 to 20 years for each count of robbery, 10 to 20 years for each count of use of a deadly weapon to commit a felony, and 10 to 10 years for each count of false imprisonment in the first degree. The court ordered the sentences for the robbery and use of a deadly weapon to commit a felony convictions to run consecutively to each other and ordered the sentences for false imprisonment to run concurrently with each other and with the other sentences.

Each of Wilson's sentences is clearly within the statutory limits. We have reviewed the record in its entirety. When we consider Wilson's criminal history and the violent nature of the crimes in this case, we cannot say that Wilson's sentences were an abuse of discretion.

[10] We do, however, find plain error in that part of the court's sentencing order which provides that Wilson's sentences for the false imprisonment convictions are to be served concurrently with the sentences for the robbery and the use of a deadly weapon convictions. An appellate court always reserves the right to note plain error which was not complained of at trial or on appeal. *State v. Robinson*, 271 Neb. 698, 715 N.W.2d 531 (2006).

[11] Although it is generally within the trial court's discretion to direct that sentences imposed for separate crimes be served concurrently or consecutively, Neb. Rev. Stat. § 28-1205(3)

(Reissue 1995) does not permit such discretion in sentencing, because it mandates that a sentence for the use of a deadly weapon in the commission of a felony be served consecutively to any other sentence imposed. See, *State v. Thomas*, 268 Neb. 570, 685 N.W.2d 69 (2004); *State v. Sorenson*, 247 Neb. 567, 529 N.W.2d 42 (1995). Because the statute mandates that the sentences imposed for the use of a weapon be consecutive to any other sentence, the district court did not have authority to order that the sentences on the two counts of false imprisonment run concurrently with the sentences on the two counts of use of a deadly weapon.

[12] An appellate court has the power on direct appeal to remand a cause for the imposition of a lawful sentence where an erroneous one has been pronounced. See *State v. Robinson, supra*. We, therefore, vacate the sentences imposed for the false imprisonment convictions and remand the cause with directions that the district court resentence Wilson such that the sentences for the false imprisonment convictions run consecutively to the sentences on the use of a deadly weapon convictions.

V. CONCLUSION

We find no merit to Wilson's assertions on appeal. The trial court did not err in its rulings regarding the admissibility of evidence of witnesses' prior identifications or prior inconsistent statements. Wilson was not denied his constitutional right to a speedy trial, and the court did not err in overruling his motion to discharge. Additionally, the court did not err by imposing excessive sentences.

However, upon our review of the record, we find plain error in the trial court's sentences to the extent that the court ordered the sentences for the false imprisonment convictions to run concurrently with the sentences for the use of a deadly weapon convictions. We therefore vacate those sentences and remand the cause to the court with directions to resentence Wilson so that the sentences for the false imprisonment convictions run consecutively to the sentences for use of a deadly weapon.

AFFIRMED IN PART, AND IN PART VACATED AND REMANDED WITH DIRECTIONS FOR RESENTENCING.

WENDY JO DREW, ON BEHALF OF MADISON JOY REED ET AL., MINOR CHILDREN, APPELLEE AND CROSS-APPELLANT, V. PATRICK WILLIAM REED, APPELLANT AND CROSS-APPELLEE.

755 N.W.2d 420

Filed August 12, 2008. No. A-07-251.

1. **Actions: Paternity: Child Support: Equity.** While a paternity action is one at law, the award of child support in such an action is equitable in nature.
2. **Paternity: Child Support: Appeal and Error.** A trial court's award of child support in a paternity case will not be disturbed on appeal in the absence of an abuse of discretion by the trial court.
3. **Paternity: Attorney Fees: Appeal and Error.** In a paternity action, attorney fees are reviewed de novo on the record to determine whether there has been an abuse of discretion by the trial judge.
4. **Paternity: Expert Witnesses: Fees: Appeal and Error.** In a dissolution action, an appellate court reviews an award of expert witness fees de novo on the record to determine whether there has been an abuse of discretion by the trial judge. The same standard applies to an award of expert witness fees in a paternity action.
5. **Child Support: Rules of the Supreme Court.** Neb. Ct. R. § 4-212 states that when a specific provision for joint physical custody is ordered, support may be calculated using worksheet 3.
6. **Child Custody.** Joint physical custody means the child lives day in and day out with both parents on a rotating basis.
7. ____. Numerous parenting times with a child do not constitute joint physical custody.
8. **Child Custody: Child Support.** Liberal parenting time does not justify a joint custody child support calculation.
9. **Waiver: Appeal and Error.** Errors not assigned in an appellant's initial brief are waived and may not be asserted for the first time in a reply brief.
10. **Child Support: Rules of the Supreme Court.** The child support guidelines permit a deviation when the total net income exceeds the monthly income amount provided for in the guidelines.
11. ____: ____. Child support for amounts in excess of the monthly income amount provided for in the child support guidelines may be more but shall not be less than the amount which would be computed using the monthly income amount provided for, unless other permissible deviations exist.
12. ____: ____. There is no single methodology or approach to setting child support when the total net income exceeds the amount provided for in the child support guidelines; rather, the question of proper support in such a case is determined by the evidence which encompasses not only methodology but a variety of other matters relating to the circumstances of the parties and the children.
13. **Stipulations: Parties: Courts.** Stipulations voluntarily entered into will be respected and enforced by the courts.

14. **Attorney Fees.** The award of attorney fees depends on multiple factors that include the nature of the case, the services performed and results obtained, the earning capacity of the parties, the length of time required for preparation and presentation of the case, customary charges of the bar, and the general equities of the case.

Appeal from the District Court for Seward County: ALAN G. GLESS, Judge. Affirmed in part, affirmed in part as modified, and in part vacated and set aside.

Mark J. Krieger, of Bowman & Krieger, for appellant.

Charles W. Campbell, of Angle, Murphy, Valentino & Campbell, P.C., for appellee.

INBODY, Chief Judge, and SIEVERS and CARLSON, Judges.

SIEVERS, Judge.

Patrick William Reed (Patrick) appeals and Wendy Jo Drew (Wendy) cross-appeals from the decision of the district court for Seward County that awarded sole custody of the parties' minor children to Wendy but ordered Patrick to pay child support based on a joint custody calculation, ordered Patrick to pay $21,658 in retroactive child support, ordered Patrick to pay $13,916.31 toward Wendy's attorney fees, and ordered Patrick to pay $27,592 in expert witness fees.

FACTUAL AND PROCEDURAL BACKGROUND

Though never married, Patrick and Wendy engaged in a long-term relationship that produced three children: Madison Joy Reed, born February 8, 1998; Jack William Patrick Reed, born April 3, 2000; and Claire Estelle Reed, born February 12, 2003. Patrick and Wendy ended their relationship in February 2004.

On August 9, 2004, Wendy filed a petition on behalf of Madison, Jack, and Claire to establish paternity and child support. On August 27, the parties filed a stipulation and agreement for a temporary order establishing that Wendy would have custody of the children, subject to Patrick's reasonable rights of visitation, and that Patrick would pay $2,700 per month in child support beginning September 1. The district court approved the parties' stipulation and entered the temporary order.

Trial was held on August 10 and 11, 2006. The court's opinion and judgment was filed on December 8. The district court adjudged that Patrick is the father of the three minor children. The district court incorporated the parties' agreement on parenting time into its judgment, thereby establishing that Wendy would "have sole legal and physical custody" of the parties' three minor children. The judgment provided that Patrick would have parenting time (1) on alternating weekends; (2) every Wednesday from 5:30 p.m. until 8 a.m. Thursday; (3) during the weeks immediately preceding each weekend that he does not have parenting time, for a period commencing at 8 a.m. on Thursday and concluding at 8 a.m. on Friday; (4) every school spring break, without interfering with Wendy's Easter parenting time; (5) two 2-week periods in the summer; and (6) alternating holidays.

The district court stated that even though Wendy was awarded sole legal and physical custody, based on the parties' parenting time agreement, Patrick will have the children 43 percent of every year, which "comes close enough to a factual joint custody" for purposes of setting child support. Thus, the district court used a joint child support calculation and ordered Patrick to pay child support in the amount of $3,337 per month for the three children beginning January 1, 2007. Wendy filed a motion to alter or amend judgment regarding the child support calculation, which was denied by the district court. However, in an addendum to its December 8, 2006, judgment, the district court ordered Patrick to pay $21,658 in retroactive child support. Additionally, taking into account both the December 8 judgment by the district court and the court's later addendum, Patrick was ordered to pay $13,916.31 toward Wendy's attorney fees and $27,592 in expert witness fees. Patrick appeals and Wendy cross-appeals the district court's judgment.

ASSIGNMENTS OF ERROR

Patrick alleges that the district court erred when it ordered him to pay an additional $13,916.31 in attorney fees, $27,592 in expert witness fees, and $21,658 in retroactive child support.

On cross-appeal, Wendy alleges that the district court erred in (1) applying a joint custody calculation for child support,

(2) calculating child support using worksheet 3 of the child support guidelines, (3) failing to award child support as determined by worksheet 1, and (4) failing to award retroactive child support based on the calculation of child support pursuant to worksheet 1.

STANDARD OF REVIEW

[1,2] While a paternity action is one at law, the award of child support in such an action is equitable in nature. *State on behalf of Kayla T. v. Risinger*, 273 Neb. 694, 731 N.W.2d 892 (2007). A trial court's award of child support in a paternity case will not be disturbed on appeal in the absence of an abuse of discretion by the trial court. *Id.*

[3] In a paternity action, attorney fees are reviewed de novo on the record to determine whether there has been an abuse of discretion by the trial judge. *Henke v. Guerrero*, 13 Neb. App. 337, 692 N.W.2d 762 (2005). Absent such an abuse, the award will be affirmed. *Id.*

[4] In a dissolution action, an appellate court reviews an award of expert witness fees de novo on the record to determine whether there has been an abuse of discretion by the trial judge. See *Davidson v. Davidson*, 254 Neb. 656, 578 N.W.2d 848 (1998). We find that the same standard applies to an award of expert witness fees in a paternity action.

ANALYSIS

Child Support Calculation.

Wendy argues that the district court erred in applying a joint custody calculation to determine child support. She argues that the district court should have used worksheet 1 to determine the child support award.

[5] The version of the child support guidelines in effect at the time of the trial and judgment in this case stated:

> C. Rebuttable Presumption. The child support guidelines shall be applied as a rebuttable presumption. All orders for child support obligations shall be established in accordance with the provisions of the guidelines unless the court finds that one or both parties have produced sufficient evidence to rebut the presumption that the guidelines

> should be applied. . . . In the event of a deviation, the reason for the deviation shall be contained in the findings portion of the decree or order, or worksheet 5 should be completed by the court and filed in the court file. Deviations from the guidelines are permissible under the following circumstances:
>
> . . . .
>
> 3. if total net income exceeds $10,000 monthly, child support for amounts in excess of $10,000 monthly may be more but shall not be less than the amount which would be computed using the $10,000 monthly income unless other permissible deviations exist[.]

The version of the child support guidelines in effect at the time of the trial and judgment in this case further stated: "L. Joint Physical Custody. When a specific provision for joint physical custody is ordered, support may be calculated using worksheet 3." In its order, the district court specifically stated: "The parties agreed, and I accepted their agreement, that sole legal and physical custody would be placed with Wendy." However, the district court also stated that based on the parties' parenting-time agreement, Patrick will have the children 43 percent of every year, which "comes close enough to a factual joint custody" for purposes of child support.

Using its finding of "factual joint custody," the district court did a joint custody child support calculation citing *Elsome v. Elsome*, 257 Neb. 889, 601 N.W.2d 537 (1999). *Elsome* holds that if the evidence establishes a joint physical custody arrangement, courts will so construe it, regardless of how prior decrees or court orders have characterized the arrangement. According to the trial court in this case, the threshold time division is 40 percent, although the *Elsome* opinion did not explicitly adopt such as a determinative percentage.

[6,7] In our view, *Elsome* is distinguishable from the present case. In *Elsome*, the decree provided that the parties would have "joint legal custody" of their children, but neither party was designated primary physical custodian of the children. The parties had a detailed shared physical custody arrangement based upon 14-day cycles, which generally provided that the children spend 4 days every week with the mother and the following 3 days

every week with the father. Thus, in *Elsome*, the parties had a true joint physical custody arrangement, regardless of whether it was labeled as such. The *Elsome* opinion favorably cites *Pascale v. Pascale*, 140 N.J. 583, 660 A.2d 485 (1995), where the New Jersey court said that although there is no established norm for joint physical custody, experts cite schedules within a joint physical custody framework as spending 3 entire days with one parent and 4 entire days with another parent or alternating weeks or even years with each parent. Thus, joint physical custody means the child lives day in and day out with both parents on a rotating basis. *Pascale, supra*. Numerous "'parenting times'" with a child do not constitute joint physical custody. *Pascale*, 140 N.J. at 597, 660 A.2d at 492. See, also, *Heesacker v. Heesacker*, 262 Neb. 179, 629 N.W.2d 558 (2001) (recognizing *Pascale, supra*).

Alternately living with divorced parents is to be distinguished from cases in which the noncustodial parent has liberal parenting time. In *Pool v. Pool*, 9 Neb. App. 453, 613 N.W.2d 819 (2000), the father had custody of his children every other weekend, plus an additional weekend day per month; weekday visitation two times a week from 4 to 8 p.m.; visitation on alternating holidays; and extended summer visitation continuously from June 1 to July 31 each year. The arrangements for parenting time for the father in *Pool* are nearly identical to those involved in the present case. The district court in *Pool* found that the father had physical custody for 33 percent of the time and determined his support obligation based on the joint physical custody worksheet. On appeal, the mother argued that the court should have used the sole custody worksheet, rather than the joint custody worksheet. This court reversed the decision of the trial court, concluding that the mother was the primary caregiver, that she had sole physical custody of the children, and that the father had been granted "'typical' weekend, holiday, and summer visitation rights." *Id*. at 458, 613 N.W.2d at 824. Thus, we found that the trial court abused its discretion in basing the child support calculation on the joint custody worksheet, rather than the sole custody worksheet.

Another "liberal parenting time" case is *Heesacker, supra*, which cited with approval our decision in *Pool, supra*. In

Heesacker, through mediation, the parents agreed to joint custody. The father was to have custody of the parties' child on alternating weekends from Friday after school until Monday morning and from Wednesday after school until Thursday morning. In addition, the father was to have custody an additional Friday night each month and 1 other day each month to be agreed upon by the parties. The visitation plan also called for each parent to have custody of the child for one-half of her summer and winter breaks from school, with holidays and birthdays split on an alternating yearly schedule. The trial court found that the time division was split 65 percent with the mother and 35 percent with the father, and the court used the sole custody worksheet to determine the father's child support obligation.

On appeal, in *Heesacker, supra*, the father argued that the trial court erred in using a sole custody worksheet, rather than a joint custody worksheet. The Nebraska Supreme Court concluded that the visitation plan adopted by the trial court was "a grant of physical custody to [the mother], with a liberal visitation schedule for [the father]." *Heesacker v. Heesacker*, 262 Neb. 179, 185, 629 N.W.2d 558, 562 (2001). Accordingly, the Supreme Court determined that the trial court was correct in calculating the father's child support based on the sole custody worksheet.

[8] The present case is more in line with *Heesacker, supra*, and *Pool v. Pool*, 9 Neb. App. 453, 613 N.W.2d 819 (2000), where there was clearly liberal parenting time, but such did not justify a joint custody child support calculation. Patrick's children do not live with him day in and day out on a rotating or alternating basis. And while he has extensive and varied parenting times, it is best described as liberal visitation as in *Heesacker, supra*, and *Pool, supra*. Thus, the trial court abused its discretion in basing the child support calculation on the joint custody worksheet, rather than the sole custody worksheet which we shall use in making the necessary adjustments to Patrick's child support obligation.

Calculation of Child Support When Income Is Above Guidelines.

[9] Patrick's financial situation is complex. He wholly owns several corporations and is part owner in other corporations that

are involved in the cellular telephone industry. Two different accountants did indepth analyses of Patrick's finances and testified regarding his income. We digress to point out that his reply brief attempts to challenge the district court's findings regarding his income. However, errors not assigned in an appellant's initial brief are waived and may not be asserted for the first time in a reply brief. *Genetti v. Caterpillar, Inc.*, 261 Neb. 98, 621 N.W.2d 529 (2001). Because Patrick did not contest the trial court's conclusions regarding his income in his original brief, we need not further detail his finances.

In contrast to the complexities of Patrick's finances, Wendy's financial situation is quite simple. She has been a stay-at-home mother. However, she agreed that she has an earning capacity of $11 per hour, and the district court accepted such. Wendy does not dispute the trial court's conclusion regarding her income capacity.

[10] Thus, we use the district court's findings that Wendy has a gross monthly earning capacity of $1,907 and Patrick has a gross monthly income of $49,195. The district court determined that based on their gross monthly incomes, Wendy's net monthly income is $1,754.03 and Patrick's net monthly income is $29,436.68. Again, neither party challenges this finding. Thus, the parties' combined net monthly income is $31,190.71, making this an "above guidelines" case. The version of the child support guidelines in effect at the time of trial and judgment in this case permitted a deviation from the child support guidelines when the total net income exceeded $10,000 monthly, and given that Patrick's net income was three times that provided for in the guidelines, deviation was clearly justified.

The obvious difficulty in an above guidelines case is determining what deviation from the guidelines is appropriate, and it must be recognized that trial courts have considerable discretion in this regard. In this case, the guidelines in effect at the time of this trial only account for approximately one-third of Patrick's net income. In short, the guidelines do not tell us how to handle child support from the remaining two-thirds of Patrick's net income. Thus, of necessity, the determination of support over the guidelines amount is largely a matter of the trial court's discretion, guided by the evidence before the trial court.

[11] The version of the child support guidelines in effect at the time of trial and judgment in this case simply told us that "child support for amounts in excess of $10,000 may be more but shall not be less than the amount which would be computed using the $10,000 monthly income unless other permissible deviations exist." The district court heard testimony from two accountants and an economics professor on how child support for monthly incomes above $10,000 can be extrapolated from the child support chart for monthly incomes below $10,000. Each witness used a different mathematical approach to, in effect, expand the child support chart beyond a monthly income of $10,000 using extrapolation.

Accountant David Ellingson determined that to avoid a "cap" on child support, for every $50 increase in income above $10,000, the child support payment should be increased by $8—Ellingson said that he used $8 for consistency purposes. Thus, Ellingson determined that the child support obligation for three children in this case would be $6,677 (this calculation attributed a net monthly income of $35,233 to Patrick and no monthly income to Wendy). The other two approaches resulted in the child support amount being "capped" with no more increases in child support, although both approaches capped at different monthly incomes. Accountant Leonard Sommer determined that child support "capped" at a monthly income of $43,000, although he did not specify whether this was net or gross income, thereby limiting the utility of his testimony. However, we will assume that he was using net income throughout his calculation. Sommer calculated that in this case, child support for three children would be $4,006.

The approach used by an economics professor, Dr. David Rosenbaum, resulted in a child support figure between that of the two accountants. Rosenbaum determined that for every $500 increase in net monthly income from $5,000 to $10,000, the increase in child support decreased by approximately $2 from the previous increase. We reproduce Rosenbaum's chart for child support for three children when the net income is above $10,000, although we leave out the "middle" of the chart in the interest of saving space, plus that portion is not terribly pertinent. Rosenbaum developed his chart for child support for

net income above $10,000 by extrapolation from the data for child support amounts for three children when the net income is between $5,000 and $10,000—but his exhibit only goes to net income of $24,500.

Estimated Child Support Payments

Net Income	Increase	Child Support Payment
$10,000		$2,645
$10,500	$78	$2,723
$11,000	$76	$2,799
$11,500	$74	$2,873
$12,000	$72	$2,945
$12,500	$70	$3,015
. . . .		
$21,000	$36	$3,899
$21,500	$34	$3,933
$22,000	$32	$3,965
$22,500	$30	$3,995
$23,000	$28	$4,023
$23,500	$26	$4,049
$24,000	$24	$4,073
$24,500	$22	$4,095

Because Rosenbaum's chart only went up to $24,500 net income, the court inquired of him what would be the amount of support for three children under his method for net income of $30,000, and his response was $4,205. Rosenbaum further testified that under the extrapolation method he used, child support "caps" at $4,205—in other words, that it would not increase any further from net earnings above $30,000 per month, even if a parent netted $100,000 per month. The district court said it "adopt[s] the Rosenbaum approach." Neither parent claims that the trial court's adoption of the Rosenbaum method was error. In addition to the trial court's error in using a joint custody calculation, we also find error in the trial court's application of the Rosenbaum methodology.

The trial court used $31,190 for net joint income, a figure that is unchallenged. The court then sought to extend the Rosenbaum calculation to this figure. It did this by taking the child support for income of $10,000 ($2,645) and adding to that figure the amount for child support for net income of $21,190

($3,899) to produce a worksheet 1 figure of $6,544. A number of things are wrong with what the district court did. First, it fundamentally ignores Rosenbaum's methodology, as well as his testimony that under his methodology, adopted by the trial court, child support does not increase when net income is above $30,000. This should not be taken as our endorsement of Rosenbaum's finding or concept that support "caps" at $30,000 under his mathematical extrapolation from the guidelines, but merely an observation that, whether intentional or not, the trial court did not really "adopt" Rosenbaum's method—which was simply a mathematical extrapolation. The trial court's method, when considered in conjunction with Rosenbaum's testimony that child support is $4,205 for $30,000 of net income, attributes $2,339 in child support to the "last" $1,190 of earnings—a clearly illogical proposition. Finally, we bear in mind that we do not, for example, determine the amount of child support for net joint earnings of $9,000 by adding together the amounts on the chart for earnings of $4,000 and $5,000—rather, we just look at what the chart says the amount is for $9,000. And while the chart does not go as high as net income of $31,190, Rosenbaum calculated the amount for that level of income while on the witness stand in direct response to the judge's request that he do so—and the answer was $4,205, not $6,544. In short, the trial judge's method is contrary to his express adoption of Rosenbaum's calculation—which was simply an expansion of the child support chart by extrapolation from the known data for child support at $500 increments between $5,000 and $10,000. Therefore, the addition of two child support amounts for two income levels within Rosenbaum's chart is clearly not supported by the evidence provided by Rosenbaum, nor is it a proper use of his methodology.

[12] If Rosenbaum's method is used, child support associated with the parties' combined monthly net income of $31,190 would be $4,205. This is not to say that it could not be higher (or lower) under the trial court's considerable discretion in an above guidelines case, or that Rosenbaum's method of extrapolation is the only acceptable methodology. Rather, although the trial court misapplied Rosenbaum's method, neither party quarrels with the adoption of it as a methodology, and given its logical

basis in mathematics, we certainly cannot conclude that it was plain error to use Rosenbaum's method. That said, we emphasize that we have no intent to establish a single methodology or approach to setting child support in an above guidelines situation. Rather, the question of proper support in an above guidelines case is determined by the evidence which encompasses not only methodology but a variety of other matters relating to the circumstances of the parties and the children. In this regard, we note that Rosenbaum freely conceded the illogic of "capping" child support when net income reached $30,000, a result which his method produced purely by mathematics.

The district court found that Patrick is responsible for 94 percent of the support amount. Therefore, Patrick's child support obligation, based on a sole custody calculation, is $3,952.70 per month, and we modify the district court's order to provide for monthly child support for three children in such amount, retroactive to January 1, 2007, the date when the trial court's child support award was to begin. Rosenbaum's extrapolation does not encompass child support for one or two children, and there will be support for the three children for a good number of years. Therefore, when the number of children requiring support changes, the parties, and the trial court if need be, can deal with that matter.

Retroactive Temporary Child Support.

Both parties appeal from the district court's award of retroactive child support. Patrick argues that the district court erred in ordering him to pay $21,658 in retroactive child support when Wendy stipulated to the amount of temporary child support. The record is clear that on August 27, 2004, Wendy, who was represented by counsel, stipulated to temporary child support of $2,700 per month. This stipulation was approved and adopted by the district court on September 2. Wendy argues that the district court erred in failing to award retroactive child support based on the calculation of child support pursuant to worksheet 1. We have handled this contention above, so we turn to Patrick's complaint.

At trial, Wendy testified that at the time the temporary child support agreement was reached, she did not have any

information about Patrick's earnings, and that Patrick had never told her anything about his earnings. She also explained that she did not have any money to hire an accountant at that time to review his financial records for the purpose of recommending an appropriate child support amount. Wendy testified that she was not in a position to decline Patrick's offer of $2,700 per month as temporary child support.

[13] We are not persuaded by Wendy's argument for a number of reasons. On cross-examination, Wendy discussed an earlier separation in 2002 which involved mediation to determine the child support for the two children they had at the time, and she acknowledged that she was then advised that Patrick's net income was above $10,000 per month. Moreover, living with Patrick and the children would obviously acquaint Wendy with the sort of lifestyle he was able to afford. Thus, she can hardly be seen as completely in the dark about his finances. Additionally, there were a number of options open to Wendy via discovery to rather quickly gain financial information—tax returns for example—before agreeing to a child support amount. And she could have entrusted the decision to the court, negotiated a different stipulation, or made it contingent upon the acquisition of more information. In the final analysis, Wendy voluntarily, with the assistance of counsel, stipulated to $2,700 per month in temporary support, and stipulations voluntarily entered into will be respected and enforced by the courts. See *Walters v. Walters*, 12 Neb. App. 340, 673 N.W.2d 585 (2004). No showing has been made that the stipulation was not voluntary—Wendy's argument being essentially premised on hindsight. And there is no showing that the children lacked for anything during the pendency of this case. In fact, the record clearly shows that anytime Wendy needed additional money during the pendency of this case for the children (or herself), Patrick provided such. Having stipulated to temporary child support, and given the considerations set forth above, we cannot find a basis to void that stipulation by an award of retroactive temporary support. The district court abused its discretion in ordering Patrick to pay $21,658 in retroactive child support. We vacate and set aside that portion of the district court's order.

Attorney Fees.

[14] Patrick argues that the district court erred in ordering him to pay an additional $13,916.31 toward Wendy's attorney fees.

> The award of attorney fees depends on multiple factors that include the nature of the case, the services performed and results obtained, the earning capacity of the parties, the length of time required for preparation and presentation of the case, customary charges of the bar, and the general equities of the case.

Gress v. Gress, 271 Neb. 122, 132, 710 N.W.2d 318, 328 (2006). Prior to trial, Patrick had already paid Wendy $2,500 for temporary attorney fees. Wendy submitted a detailed accounting of her attorney fees showing an outstanding balance of $15,184.79, and Patrick was ordered to pay $13,416.31 of such amount. Patrick was later ordered to pay an additional $500 to Wendy's attorney for services rendered in connection with the motion to alter or amend judgment. After a thorough review of the record, and considering the significant difference in the parties' earning capacities, we find that the district court did not abuse its discretion in ordering Patrick to pay the additional $13,916.31 toward Wendy's attorney fees, and we affirm this aspect of the district court's order.

Expert Witness Fees.

Patrick argues that the district court erred in ordering him to pay $27,592 in expert witness fees. We note that the appointment of the expert is not challenged. The district court appointed Ellingson to (1) analyze Patrick's personal and corporate tax returns for the years 2000 through 2004; (2) analyze income earned by and cashflow provided for Patrick from all disclosed sources for the years 2001 through 2004; (3) compute child support based upon the child support guidelines; and (4) prepare a comprehensive report summarizing the analysis and computation and recommending child support, based on the procedures performed. Patrick's financial circumstances are complex, and there is no evidence that such fees were not reasonable and necessary. The district court did not abuse its discretion in ordering Patrick to pay such fees, given the great disparity in the parties'

income and the necessity to have expertise to assess Patrick's complex financial situation. We affirm this aspect of the district court's order.

CONCLUSION

We find that although Patrick has numerous and varied parenting times, it is liberal visitation and not joint custody. As a result, the trial court erred in basing the child support calculation on the joint custody worksheet, rather than the sole custody worksheet. Patrick's child support obligation, based on a sole custody calculation, shall be $3,952.70 per month for three children, and we modify the district court's order in this regard. This monthly child support amount shall be paid retroactive to January 1, 2007, the date provided for in the trial court's order.

We find that the district court abused its discretion in ordering Patrick to pay $21,658 in retroactive temporary child support. We vacate and set aside that portion of the district court's order.

The district court did not abuse its discretion in ordering Patrick to pay the additional $13,916.31 toward Wendy's attorney fees, and we affirm this aspect of the district court's order. Nor did the district court abuse its discretion in ordering Patrick to pay attorney fees for Wendy, given the great disparity in the parties' income, and we affirm this aspect of the district court's order.

The district court did not abuse its discretion in ordering Patrick to pay $27,592 in expert witness fees, given the great disparity in the parties' income and the necessity to have expertise to assess his complex financial situation. We affirm this aspect of the district court's order.

AFFIRMED IN PART, AFFIRMED IN PART AS MODIFIED, AND IN PART VACATED AND SET ASIDE.

DEBRA KAYE MYHRA, APPELLEE, V. PHILLIP JEROME MYHRA, APPELLANT.

756 N.W.2d 528

Filed August 19, 2008. No. A-06-1403.

1. **Divorce: Appeal and Error.** In actions for dissolution of marriage, an appellate court reviews the case de novo on the record to determine whether there has been an abuse of discretion by the trial judge.
2. **Judges: Words and Phrases.** A judicial abuse of discretion exists when a judge, within the effective limits of authorized judicial power, elects to act or refrains from acting, and the selected option results in a decision which is untenable and unfairly deprives a litigant of a substantial right or a just result in matters submitted for disposition through a judicial system.
3. **Divorce: Child Custody: Child Support: Property Division: Alimony: Attorney Fees: Appeal and Error.** The abuse of discretion standard of review applies to the trial court's determinations regarding custody, child support, division of property, alimony, and attorney fees.
4. **Trial: Evidence: Appeal and Error.** The reopening of a case to receive additional evidence is a matter within the discretion of the district court and will not be disturbed on appeal in the absence of an abuse of that discretion.
5. ____: ____: ____. In an appeal of an equitable action, an appellate court tries factual questions de novo on the record, provided that where credible evidence is in conflict on a material issue of fact, the appellate court considers and may give weight to the fact that the trial judge heard and observed the witnesses and accepted one version of the facts rather than another.
6. **Pretrial Procedure.** Parties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action.
7. ____. A party is under a duty seasonably to amend a prior response if he or she obtains information upon the basis of which he or she knows that the response though correct when made is no longer true and the circumstances are such that a failure to amend the response is in substance a knowing concealment.
8. **Trial: Evidence: Appeal and Error.** Among factors traditionally considered in determining whether to allow a party to reopen a case to introduce additional evidence are (1) the reason for the failure to introduce the evidence, i.e., counsel's inadvertence, a party's calculated risk or tactic, or the court's mistake; (2) the admissibility and materiality of the new evidence to the proponent's case; (3) the diligence exercised by the requesting party in producing the evidence before his or her case closed; (4) the time or stage of the proceedings at which the motion is made; and (5) whether the new evidence would unfairly surprise or unfairly prejudice the opponent.
9. **Trial: Testimony.** Admission of testimony that is beyond the scope of the permission granted to adduce additional testimony is discretionary.
10. **Property Division: Valuation: Time: Appeal and Error.** There is no "hard and fast" rule concerning valuation dates so long as the selected date bears a rational relationship to the property to be divided, and the selected date is reviewed for an abuse of discretion.

11. **Property Division.** Although the division of property is not subject to a precise mathematical formula, the general rule is to award a spouse one-third to one-half of the marital estate, the polestar being fairness and reasonableness as determined by the facts of each case.
12. **Evidence: Words and Phrases.** Evidence is relevant if it has any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence, or the evidence tends to establish a fact from which the existence or nonexistence of a fact in issue can be directly inferred.
13. **Judges.** The partiality of a judge is established when a reasonable person would have to conclude that a judge was partial to one party to the action.
14. **Divorce: Property Division: Alimony.** In dividing property and considering alimony upon a dissolution of marriage, a court should consider four factors: (1) the circumstances of the parties, (2) the duration of the marriage, (3) the history of contributions to the marriage, and (4) the ability of the supported party to engage in gainful employment without interfering with the interests of any minor children in the custody of each party.
15. **Alimony: Appeal and Error.** In reviewing an alimony award, an appellate court does not determine whether it would have awarded the same amount of alimony as did the trial court, but whether the trial court's award is untenable such as to deprive a party of a substantial right or just result.
16. **Alimony.** In determining whether alimony should be awarded, in what amount, and over what period of time, the ultimate criterion is one of reasonableness.
17. ____. The purpose of alimony is to provide for the continued maintenance or support of one party by the other when the relative economic circumstances make it appropriate. Alimony should not be used to equalize the incomes of the parties or to punish one of the parties.
18. ____. Disparity in income or potential income may partially justify an award of alimony.
19. **Appeal and Error.** To be considered by an appellate court, an alleged error must be both specifically assigned and specifically argued in the brief of the party asserting the error.
20. **Equity: Fraud.** Under the doctrine of unclean hands, a person who comes into a court of equity to obtain relief cannot do so if he or she has acted inequitably, unfairly, or dishonestly as to the controversy in issue.
21. **Property Division: Interest.** A district court can exercise its discretion and award interest on deferred installments payable as part of a marital property distribution.
22. **Property Division: Interest: Time.** When exercising its discretionary power, one factor the district court should consider when determining whether a property settlement payable in installments should draw interest from the date of judgment is the burden on the payor-spouse.

Appeal from the District Court for Douglas County: JAMES T. GLEASON, Judge. Affirmed.

Larry R. Demerath, of Demerath Law Offices, for appellant.

Edith T. Peebles and Anthony W. Liakos, of Brodkey, Cuddigan, Peebles & Belmont, L.L.P., for appellee.

INBODY, Chief Judge, and SIEVERS and CARLSON, Judges.

SIEVERS, Judge.

Debra Kaye Myhra filed for dissolution of her marriage in the district court for Douglas County. Before trial, her husband, Phillip Jerome Myhra, learned that his employer could merge with another company, which would entitle him to a multimillion-dollar bonus. Phillip did not disclose this information to Debra, despite her interrogatory asking him whether he had any interest in any expectations or awards. After Debra rested her case but before a decree had been issued, Debra made a motion to the court to withdraw her rest to introduce evidence about the merger and the bonus. The court sustained her motion, and she introduced evidence regarding Phillip's bonus. The trial court found that the merger bonus was marital property and awarded Debra a portion thereof. Phillip now appeals.

FACTUAL AND PROCEDURAL BACKGROUND

Debra and Phillip were married on September 9, 1978. They have three children, born April 17, 1987, April 4, 1990, and July 19, 1995. Since mid-December 1999, Phillip has worked as the executive vice president for UICI, a health insurance company. In 2002, Phillip earned $499,723. In 2003, Phillip earned $644,546. In 2004, Phillip earned $855,153. In 2005, Phillip earned $814,060. Debra works as a medical technologist and earns approximately $25 per hour working part time, but she has earned as much as $60,000 per year when working full time.

Debra filed a petition for dissolution of marriage in the district court for Douglas County on August 6, 2004. On October 6, 2004, Debra submitted interrogatories to Phillip, including the following interrogatory: "Do you own or have a direct or indirect interest in any other property or thing of value whatsoever, including but not limited to royalties, copyright, trademarks, expectations or awards?" During the pendency of the action, Phillip never disclosed that UICI was contemplating a merger with an investment group and that such a merger would entitle Phillip to a multimillion-dollar bonus.

In the summer of 2005, Phillip was aware that UICI could potentially merge with the investment group. On September 15, 2005, UICI entered into a merger agreement with the investment group. As part of this merger agreement, UICI adopted a bonus plan in which Phillip became entitled to a merger bonus, assuming the merger was completed and he was still employed upon the date the merger was completed. The amount of his bonus would be based upon the price of UICI stock on the date the merger was completed.

On October 20, 2005, a trial on Debra's petition for dissolution was held in the district court for Douglas County. At the time of the trial, the merger agreement was available to the public because it was filed with the Securities and Exchange Commission on September 15, 2005, and such filing revealed that a pool of $20 million would be available to pay bonuses to four UICI executives, one of whom was Phillip, upon completion of the merger.

Debra rested her case on October 20, 2005, but on December 15, she made a motion to the district court to withdraw her rest so that she could introduce evidence regarding the merger and merger bonus. The district court found that Phillip had failed to supplement his answers to interrogatories and that Phillip had concealed information regarding the merger and merger bonus from Debra and the court. It therefore allowed Debra to reopen her case.

On July 25, 2006, further trial proceedings were held, and Debra introduced evidence that on April 5, 2006, the merger between UICI had been completed, that Phillip's interest in the merger bonus had vested, and that the gross amount of the merger bonus was $3,378,160, 60 percent of which had been distributed to Phillip on the day the merger closed and 40 percent of which was to be distributed to him within 180 days of the merger. Evidence was also introduced that Phillip had cashed out certain UICI stock options for $1,909,500 and sold certain UICI stock for $60,700, and that he had received a gross bonus in 2006 of $398,937 for work performed in 2005 (the 2005 bonus). Phillip attempted to introduce the testimony of Dennis Hein, a certified public accountant. Hein would have testified that Phillip's merger bonus would not have been considered an

asset under generally accepted accounting principles until the date that it vested on April 5, 2006, when the merger was completed. Debra made a motion in limine asking the district court to exclude the testimony of Hein, and the district court sustained the motion.

In the district court's decree of dissolution of marriage, it found that all of the parties' property was marital property, including the merger bonus and the 2005 bonus; that the assets for which evidence was adduced at the October 20, 2005, trial would be valued based on that date; and that assets for which evidence was introduced at the July 25, 2006, trial would be valued based on that date. The district court awarded Phillip $7,796,574 of marital property. It awarded Debra a $2 million judgment to be paid within 3 years of the decree, plus interest at 7.014 percent; $485,964 worth of marital assets; $3,000 per month in alimony until she reached age 65; and $25,000 in attorney fees. Phillip timely appealed.

ASSIGNMENTS OF ERROR

Phillip assigns the following errors to the district court: (1) allowing Debra to withdraw her rest, (2) allowing Debra to introduce evidence beyond the scope of her motion to withdraw her rest, (3) determining that the merger bonus and 2005 bonus were marital property, (4) using incorrect dates to value the parties' marital estate, (5) sustaining Debra's motion in limine regarding the testimony of Hein, (6) acting with passion and prejudice, (7) awarding unreasonable alimony, (8) finding Phillip in contempt for certain sales of stock made by him, (9) failing to find Debra had unclean hands, and (10) failing to clarify the interest on the judgment.

STANDARD OF REVIEW

Dissolution of Marriage, Division of Marital Property, and Alimony.

[1,2] In actions for dissolution of marriage, an appellate court reviews the case de novo on the record to determine whether there has been an abuse of discretion by the trial judge. *Tyma v. Tyma*, 263 Neb. 873, 644 N.W.2d 139 (2002). A judicial abuse of discretion exists when a judge, within the effective limits of authorized judicial power, elects to act or refrains from

acting, and the selected option results in a decision which is untenable and unfairly deprives a litigant of a substantial right or a just result in matters submitted for disposition through a judicial system. *Bauerle v. Bauerle*, 263 Neb. 881, 644 N.W.2d 128 (2002).

[3] The abuse of discretion standard of review applies to the trial court's determinations regarding custody, child support, division of property, alimony, and attorney fees. *Millatmal v. Millatmal*, 272 Neb. 452, 723 N.W.2d 79 (2006).

Reopening Case and Withdrawing Rest.

[4] The reopening of a case to receive additional evidence is a matter within the discretion of the district court and will not be disturbed on appeal in the absence of an abuse of that discretion. *Jessen v. DeFord*, 3 Neb. App. 940, 536 N.W.2d 68 (1995).

Unclean Hands.

[5] In an appeal of an equitable action, an appellate court tries factual questions de novo on the record, provided that where credible evidence is in conflict on a material issue of fact, the appellate court considers and may give weight to the fact that the trial judge heard and observed the witnesses and accepted one version of the facts rather than another. *Burk v. Demaray*, 264 Neb. 257, 646 N.W.2d 635 (2002).

ANALYSIS

Whether Debra Should Have Been Allowed to Withdraw Her Rest.

[6] It is clear that the primary reason Debra was allowed to withdraw her rest was because the district court found that Phillip had knowingly concealed information about the merger bonus from her and from the court. Debra had asked Phillip via interrogatory whether he had *any interest in any expectations or awards*. Despite this question, Phillip never disclosed, prior to the 2005 trial, to Debra that he could receive the merger bonus or the conditions upon which receiving such hinged. The terms of the merger were such that the bonus provided for therein was clearly an expectation. An expectation is a "basis on which something is expected to happen; esp., the prospect of receiving

wealth, honors, or the like." Black's Law Dictionary 598 (7th ed. 1999). Parties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action. Neb. Ct. R. Disc. § 6-326(b)(1). Clearly, Debra was entitled to discovery regarding Phillip's possible merger bonus.

[7] Under § 6-326(e), a party has a duty to supplement answers to interrogatories as follows:

> (2) A party is under a duty seasonably to amend a prior response if he or she obtains information upon the basis of which . . . (B) he or she knows that the response though correct when made is no longer true and the circumstances are such that a failure to amend the response is in substance a knowing concealment.

Based on these rules, Phillip had a duty to disclose the potential of the merger bonus. It was not Debra's duty to independently determine that Phillip could receive a merger bonus, for example, by scouring SEC filings, because she had already queried him via an interrogatory (unobjected to, we note) that was broad enough to include the expectation of the merger bonus. Even if he did not know of the potential merger bonus until September 15, 2005, that would have been still more than a month before the October 20 trial. And when he learned of the $20 million bonus pool in which he could share, his prior responses to interrogatories were no longer true, he should have supplemented his answers, and his failure to amend his responses was a knowing concealment. On this basis, the trial was reopened and Debra was allowed to introduce evidence on the merger bonus and related facts, and we agree with the district court's view of the discovery issue. Phillip argues that the case should not have been reopened.

[8] Among factors traditionally considered in determining whether to allow a party to reopen a case to introduce additional evidence are (1) the reason for the failure to introduce the evidence, i.e., counsel's inadvertence, a party's calculated risk or tactic, or the court's mistake; (2) the admissibility and materiality of the new evidence to the proponent's case; (3) the diligence exercised by the requesting party in producing the evidence before his or her case closed; (4) the time or stage of the

proceedings at which the motion is made; and (5) whether the new evidence would unfairly surprise or unfairly prejudice the opponent. *Jessen v. DeFord*, 3 Neb. App. 940, 536 N.W.2d 68 (1995) (citing 75 Am. Jur. 2d *Trial* § 382 (1991)).

Phillip essentially argues that Debra should have introduced evidence of the merger bonus during the 2005 portion of the trial. He claims she was not diligent in her efforts to introduce evidence of the merger bonus, waited too long to introduce such evidence, and had no justification for failing to introduce such evidence. However, all of these arguments are completely refuted by the fact that Phillip concealed information from Debra regarding the merger bonus, even though he had such information no less than 30 days before the trial and admits he was aware of the potential of the merger in the summer of 2005. In an affidavit, Phillip claims Debra had actual and constructive notice of the merger because of the SEC filing, as well as alleged conversation with Debra's lawyer at a break during the trial in which he allegedly told the lawyer that there was going to be a merger.

There are several reasons why this argument is unavailing. First, Philip is essentially arguing that "Debra should have discovered, by searching SEC filings, that she could not trust his interrogatory answers," although they were given under oath. Obviously, to embrace this notion would be to emasculate the core notions of full and honest disclosure and discovery upon which our civil judicial system depends. Second, the affidavit does not claim Debra, via the conversation between Phillip and Debra's lawyer, had actual or constructive knowledge of the *merger bonus*. Phillip had been specifically asked whether he had any interest in any "expectations or awards," and at no point was Phillip relieved of his duty to supplement his answers to interrogatories and provide Debra information regarding the merger bonus. It was his failure to do so which prevented Debra from introducing evidence regarding the merger bonus in the 2005 portion of the trial.

Phillip also claims that the evidence Debra introduced in the 2006 portion of the trial was inadmissible and immaterial and that he was prejudiced by its admission. However, the claim is really an argument that the merger bonus was not marital

property, and we address that question below. Its relevancy is obvious.

[9] Phillip also asserts that the district court erred in allowing Debra to introduce evidence beyond the scope of her motion to withdraw her rest. But, admission of testimony that is beyond the scope of the permission granted to adduce additional testimony is discretionary. See *Lewelling v. McElroy*, 148 Neb. 309, 27 N.W.2d 268 (1947). The additional evidence Debra was allowed to introduce, such as information regarding Phillip's stock and stock options and his 2005 bonus, was closely related to the scope of her motion to withdraw her rest. Prior to the merger, Phillip held stock and stock options in UICI, and as a result of the merger, Phillip was required to sell these options. And Phillip's 2005 bonus was based on the same year, 2005, during which UICI entered into the merger agreement. The district court did not abuse its discretion in receiving such evidence, because it was related to the merger and the bonus flowing therefrom.

The district court allowed Debra to withdraw her rest so that she could introduce evidence regarding the merger bonus, evidence which Phillip had wrongfully and knowingly concealed from her. The district court did not abuse its discretion in sustaining Debra's motion to withdraw her rest.

Whether District Court Abused Its Discretion by Determining That Merger Bonus and 2005 Bonus Were Marital Property.

The district court chose July 25, 2006, as the valuation date for the merger bonus and the 2005 bonus. The district court selected this valuation date for these assets because it was on that date that evidence was introduced regarding them. Phillip argues that the district court abused its discretion in using this valuation date because it is not rationally related to the bonuses and the bonuses did not arise from the joint efforts of the parties.

[10] There is no "hard and fast" rule concerning valuation dates so long as the selected date bears a rational relationship to the property to be divided, and the selected date is reviewed for an abuse of discretion. See *Walker v. Walker*, 9 Neb. App. 694, 618 N.W.2d 465 (2000).

We cannot say the district court abused its discretion in selecting July 25, 2006, as the valuation date for the merger bonus. Phillip's claim that the merger bonus is not the product of the parties' joint efforts is not supported by the nature of the bonus. The bonus was contingent on Phillip's continued employment until the completion of the merger and also on the UICI stock price. It does not appear that the merger bonus is based only on some discrete time period of Phillip's employment such that these efforts can be distinguished from the parties' joint efforts made during the marriage. See *Davidson v. Davidson*, 254 Neb. 656, 578 N.W.2d 848 (1998) (to extent husband's unvested employee stock options and stock retention shares were accumulated and acquired during marriage, they were accumulated and acquired through joint efforts of parties). Rather, the merger bonus appears to be based on Phillip's cumulative efforts as an executive vice president with UICI from mid-December 1999 until the date the merger was completed. Phillip was not required to continue his employment with UICI or the subsequent entity formed by the merger beyond the date when the merger bonus vested in order to receive the merger bonus. From this fact, it is a reasonable inference that the merger bonus was a reward for Phillip's past efforts, rather than future services. This can also be seen in the fact that the merger bonus was indexed to UICI's stock price at the time of the merger. Phillip's contribution to UICI's stock price was obviously a key component of his career with UICI, as well as a form of compensation in the sense that the higher the stock price, the more valuable the options. Phillip's efforts as a high ranking executive throughout his employment with UICI from mid-December 1999 until the merger bonus vested on April 4, 2006, obviously contributed to the UICI stock price. Because the merger bonus was based on Phillip's efforts for many years during which he was married to Debra, we cannot say the district court abused its discretion in picking a valuation date for the merger bonus of July 25, 2006, and finding that the merger bonus was marital property.

[11] Phillip also argues that there is no rational relationship between the valuation date of July 25, 2006, and the 2005 bonus. It does appear that that the 2005 bonus, which was based

on Phillip's efforts in 2005, is not so much a product of the parties' joint efforts, particularly considering that Debra filed for divorce in 2004. However, we note that even if we were to consider the 2005 bonus as Phillip's nonmarital property, we nevertheless would not reduce the district court's allocation of roughly one-third of the marital estate to Debra, because such is on the low end of the accepted range. Because this was a long-term marriage to which Debra contributed in a substantial way, her portion of the marital estate could have been closer to one-half. The district court's judgment of $2 million, in combination with the $485,964 worth of assets Debra was awarded, is approximately one-third of the net marital estate of $8,334,731.87—even if we were to remove the 2005 bonus from the marital estate, we would not reduce her allocation of the marital estate. We recognize these figures do not account for taxes Phillip has paid or will pay on certain assets, but the evidence on tax consequences is limited to Phillip's testimony that he was in the "35% bracket." That information is insufficient for us to make any findings about the tax consequences of the bonus or the stock options. But even if we used a hypothetical rate of 35 percent of the bonus and stock options, Debra's share of the net marital estate would still be within the one-third to one-half rule parameter for property division in a dissolution. Although the division of property is not subject to a precise mathematical formula, the general rule is to award a spouse one-third to one-half of the marital estate, the polestar being fairness and reasonableness as determined by the facts of each case. *Gress v. Gress*, 271 Neb. 122, 710 N.W.2d 318 (2006). Here, the district court's award to Debra, while in line with the one-third to one-half rule, was on the low end of that permissible range. Therefore, even if we were to agree with Phillip that the 2005 bonus was nonmarital property, we would not reduce Debra's award, given her substantial contributions to the parties' marriage over the course of nearly 30 years.

We affirm the district court's valuation date with regard to the merger bonus, and to the extent we agree with Phillip's argument that the 2005 bonus should have been considered his nonmarital property, we nevertheless would not and do not disturb Debra's award.

Whether District Court Erred in Sustaining Debra's Motion in Limine Regarding Testimony of Hein.

Phillip attempted to introduce the testimony of Hein, a certified public accountant, who would have testified that for the purposes of generally accepted accounting practices, the merger bonus was not an asset until April 6, 2006, when the merger was completed. On Debra's motion in limine, the district court excluded the testimony of Hein. Phillip argues that this testimony should not have been excluded and that he was prejudiced by its exclusion.

[12] Evidence is relevant if it has any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence, or the evidence tends to establish a fact from which the existence or nonexistence of a fact in issue can be directly inferred. See Neb. Rev. Stat. § 27-401 (Reissue 1995).

Under that definition of relevancy, the testimony of Hein may have been of some marginal relevancy, but was certainly not determinative as to whether the merger bonus was marital property, and should have been considered by the trial judge "for what it was worth." That said, the determination of what is marital property is fundamentally guided by Nebraska case law—not accounting principles. Because of our de novo standard of review, we consider Hein's testimony via the offer of proof. After considering such, we conclude that the trial court did not err in concluding that the merger bonus was marital property, irrespective of an accountant's opinion to the contrary. Therefore, while Hein's testimony should have been received, there is no prejudice to Phillip from its exclusion.

Whether District Court Acted With Passion and Prejudice.

Phillip claims that the district court's findings that all assets and debts of the parties were marital was motivated by passion or prejudice. However, there is simply no proof that the district court's determinations were the consequence of anything other than appropriate legal determinations.

[13] The partiality of a judge is established when a reasonable person would have to conclude that a judge was partial to one

party to the action. See, *Dowd v. First Omaha Sec. Corp.*, 242 Neb. 347, 495 N.W.2d 36 (1993); *State v. Pattno*, 254 Neb. 733, 579 N.W.2d 503 (1998). Other than not liking the trial judge's rulings, Phillip points to nothing in the record which would satisfy this standard.

Here, the district court's determination that all assets and debts were marital was based on the evidence and established precedent. Obviously, Phillip's primary concern is the merger bonus and the reopening of the record. We have previously explained our strong agreement with the court's view of the discovery issue that readily justified the reopening of the record. We have explained above why the merger bonus is marital property, and there is no proof that anything other than appropriate legal determinations caused the district court to find the same.

Whether District Court Abused Its Discretion in Its Award of Alimony.

[14-16] Phillip claims the district court awarded unreasonable alimony. In dividing property and considering alimony upon a dissolution of marriage, a court should consider four factors: (1) the circumstances of the parties, (2) the duration of the marriage, (3) the history of contributions to the marriage, and (4) the ability of the supported party to engage in gainful employment without interfering with the interests of any minor children in the custody of each party. *Schaefer v. Schaefer*, 263 Neb. 785, 642 N.W.2d 792 (2002). In reviewing an alimony award, an appellate court does not determine whether it would have awarded the same amount of alimony as did the trial court, but whether the trial court's award is untenable such as to deprive a party of a substantial right or just result. *Bowers v. Lens*, 264 Neb. 465, 648 N.W.2d 294 (2002). In determining whether alimony should be awarded, in what amount, and over what period of time, the ultimate criterion is one of reasonableness. *Id.*

[17,18] The purpose of alimony is to provide for the continued maintenance or support of one party by the other when the relative economic circumstances make it appropriate. Alimony should not be used to equalize the incomes of the parties or to

punish one of the parties. *Kalkowski v. Kalkowski*, 258 Neb. 1035, 607 N.W.2d 517 (2000). However, disparity in income or potential income may partially justify an award of alimony. *Bauerle v. Bauerle*, 263 Neb. 881, 644 N.W.2d 128 (2002).

Here, the parties were married for nearly 30 years and each party made substantial contributions to the marriage. The district court awarded Debra $3,000 per month until she reaches the age of 65 years, dies, or remarries, whichever occurs first. There is great disparity between the parties' incomes. Debra has never earned more than $60,000 in a year and currently earns $25 per hour for part-time work while being primarily responsible for the raising of the parties' three children. Phillip earned more than $800,000 per year in 2004 and 2005. Thus, alimony of $36,000 per year for a maximum of approximately 10 years seems rather insignificant and completely appropriate in the factual setting of this case. Clearly, Phillip will have no problem paying Debra $3,000 per month, and the district court's award of alimony to Debra was reasonable and was not an abuse of its discretion.

Whether District Court Erred in Finding Phillip in Contempt for Certain Sales of Stock Made by Him.

[19] Although Phillip assigns error to the district court's finding him in contempt for certain sales of stock, he does not specifically argue this point, and therefore we will not address it. To be considered by an appellate court, an alleged error must be both specifically assigned and specifically argued in the brief of the party asserting the error. *In re Estate of Matteson*, 267 Neb. 497, 675 N.W.2d 366 (2004).

Whether District Court Erred in Failing to Find That Debra Had Unclean Hands.

[20] Phillip claims that Debra had unclean hands and should therefore have been denied the opportunity to withdraw her rest and receive attorney fees. Under the doctrine of unclean hands, a person who comes into a court of equity to obtain relief cannot do so if he or she has acted inequitably, unfairly, or dishonestly as to the controversy in issue. *Manker v. Manker*, 263 Neb. 944, 644 N.W.2d 522 (2002).

Phillip's brief implies that Debra's claim to have been unaware of his merger bonus prior to her motion to withdraw her rest is dishonest, but there is simply no evidence of this. The fact that, in a conversation between Phillip's and Debra's lawyers during trial, the pendency of the merger was mentioned does not equate to the knowledge that Debra or her counsel was aware Phillip was in line to receive a multimillion-dollar bonus—remembering that such topic was covered by the unanswered interrogatory we have previously discussed in considerable detail. Phillip also claims that Debra "falsely alleged that she was unable to procure the deposition testimony of . . . Hein" and thus blocked Hein's testimony. But the record shows that Hein stated to Debra's counsel less than 2 weeks before trial that he did not have sufficient information from Phillip to answer Debra's questions. Therefore, Debra's counsel did not falsely state that she was unable to obtain Hein's testimony. The district court did not err in not finding that Debra had unclean hands.

Whether District Court Erred in Failing to Clarify Interest on Judgment.

Phillip claims that the decree of dissolution was unclear as to whether interest should accrue on the deferred judgment from the date of the decree, and Phillip claims that interest should not accrue on the $2 million judgment from the date of the decree.

[21,22] A district court can exercise its discretion and award interest on deferred installments payable as part of a marital property distribution. See *Seemann v. Seemann*, 225 Neb. 116, 402 N.W.2d 883 (1987). When exercising its discretionary power, one factor the district court should consider when determining whether a property settlement payable in installments should draw interest from the date of judgment is the burden on the payor-spouse. See *Nickel v. Nickel*, 201 Neb. 267, 267 N.W.2d 190 (1978).

Despite Phillip's claim that the decree was vague on the issue of interest, the district court, in fact, clearly ordered that interest accrue on the deferred award from the date of the decree, but that he could pay the judgment early. Given that Phillip quite obviously has the resources to pay the judgment immediately

and thereby avoid interest, there simply is no reason that he should not pay interest on it if he chooses to defer payment. Payment of interest in these circumstances is not an unreasonable burden for him.

CONCLUSION

For the foregoing reasons, we affirm the decision of the district court in all respects.

AFFIRMED.

HEADNOTES
Contained in this Volume